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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 7 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JAMES HEUSS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 86,544

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant/Defendant and Respondent was the Appellee/ Prosecution in the Fourth District Court of Appeal and the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in the for Broward County, Florida, respectively.

In the brief, the parties will be referred to as the appear before this Court.

The symbol "R" will denote Record on Appeal.

The symbol "SR" will denote First Supplemental Record on Appeal.

The symbol "SRR" will denote Second Supplemental Record on Appeal.

The symbol "PB" will denote Petitioner's Brief on the Merits.

The symbol "RB" will denote Respondent's Brief on the Merits.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts Respondent's additions to his Statement of the Facts and Statement of the Case for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Petitioner relies on the summary in his brief on the merits for purposes of this appeal.

ARGUMENT

POINT I

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN APPELLATE COURT MAY SUA SPONTE DETERMINE AN ERROR HARMLESS WHERE THE STATE FAILS TO ALLEGE, ARGUE AND PROVE HARMLESS ERROR.

Respondent maintains that appellate sua sponte harmless error review is proper because such is authorized by statute. RB. 13-17. It contends that §§ 59.041 and 924.33, Fla. Stat., require appellate courts to affirm convictions where no harmful error has occurred, despite the fact that the State fails to address, argue or prove, beyond a reasonable doubt, that the error in question was harmless. RB. 13, 15. Respondent justifies sua sponte harmless error review under these circumstances by claiming that the statutes make harmless error review nonwaivable and that, unlike the criminally convicted who can redress ineffective assistance of counsel through post-conviction relief, See Fla. R. Crim. P. 3.850, the State has no matching remedy when its lawyers are ineffective, as it admits they were in the instant appeal to the Fourth District (RB 14-5). The State further contends that since a conviction comes to an appellate court with the presumption of correctness, an appellant has the burden to prove that the complained of error is harmful. RB. 17-8.

While prior to 1986, courts in this state held that a criminally convicted appellant had to show why complained of error was harmful, See, e.g., Lee v. State, 456 So. 2d 1211 (Fla. 3d DCA 1994), since this Court's DiGuilio, decision, the burden is on the State, as beneficiary of the trial court error, to prove its harmlessness beyond a reasonable doubt. Id., 491 So. 2d 1129, 1139 (Fla. 1986). Moreover, while appellants are on notice that §§ 59.041 and 924.33 require appellate courts not to reverse conviction unless error is harmful, they are also implicitly aware of the DiGuilio standard

and the corresponding burden of proof. Consequently, Respondent's contention is without merit.

The State's charge that it is without a remedy for its attorneys' ineffectiveness in failing to allege, argue and prove the harmlessness of trial error, is plainly wrong. This argument is disingenuous, inasmuch as Respondent places itself above all other appellate litigants. How often have prosecutors and assistant attorney generals criticized defendants who refuse to accept responsibility for their criminal conduct by asserting that they are not at fault because their actions were the result of a disadvantaged childhood? Respondent appears to believe that it, too, can wash its hands of its poor or deficient performance because appellate courts, as its parent, must bail out the child-like State when its lawyers foul up.

The contention that appellate courts must help the State when it blunders is the antithesis of Respondent's assertion that appellate courts do not abandon their impartiality or independence when engaging in sua sponte harmless error review (RB. 17). Appellate courts cannot be both impartial and, at the same time, cover for the State's failure to prove an error harmless by culling an appellate record to advance arguments the State forgot to make. On the contrary, the requirement that appellate courts make an independent review of the record on appeal to determine an error's harmfulness is predicated upon the State alleging and proving, pursuant to DiGuilio, supra, the harmlessness of that error. Ciccarelli v. State, 531 So. 2d 129, 130 (Fla. 1988).

The State's concern that it is without a remedy for their lawyer's ineffectiveness is also untrue. It has the same remedy that an ineffectively counselled criminal defendant has: a new trial. By their very nature, trial errors, which are arguably harmless,

cannot, upon reversal, result in a defendant's discharge.[1] Consequently, the State is not prejudiced by a prohibition against sua sponte harmless error review because it retains the ability to reprosecute defendants whose convictions are reversed for error which the State did not prove to be harmless.

While the legislature requires appellate courts not to reverse judgments unless trial court error injuriously affected the substantial rights of the appellant and not to presume the injurious nature of such error, §924.33, Fla. Stat., it remains within this Court's power to determine when an error is harmless **and** the analysis to be used in making such a determination. State v. Lee, 531 So. 2d 133, 136-7 n.1 (Fla. 1988); State v. DiGuilio, supra at 1139. The legislature can legislate all they want; however, it is this Court's duty to interpret and apply the statutory law within Florida and federal constitution parameters. See State v. Hamilton, 574 So. 2d 124, 130 (Fla. 1991).

In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the United States Supreme Court held that the government bears the burden of proving, beyond a reasonable doubt, that error is harmless. This Court's DiGuilio holding complies with Chapman, as indeed it must. Florida courts, no less than the federal, must operate under the United States Constitution, State v. Hamilton, supra, and harmless error review, pursuant to §§ 924.33 and 59.041, must comport with federal constitutional standards.

Under the federal constitution, a state may grant persons subject to its criminal laws greater rights than are available under federal decisional law. Cooper v. California, 386 U.S. 58, 62, 87 S. Ct. 788, 791, 17 L. Ed. 2d 730 (1967). To this extent, this

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[1]Certainly, a trial court's erroneous denial of a motion for judgment of acquittal will not be argued in terms of harmless error, since such an issue has nothing to do with a jury's verdict.

Court may, in keeping with it prior decisions in State v. Lee, supra, Cicarrelli, supra and DiGuilio, supra give persons appealing Florida criminal convictions greater protections by prohibiting appellate sua sponte harmless error review when the State fails to sustain its burden of harmless error persuasion and proof. However, under no circumstances can the federal standard be abridged.

In United States v. Giovannetti, 928 F.2d 225 (7th Cir. 1991), the Seventh Circuit addressed the same issue as in the instant case; namely, the propriety of (federal) appellate courts to engage in sua sponte harmless error review when the government fails to allege and prove an error harmless. As in the present case (RB. 15-6), the government, in Giovannetti, argued that harmless error cannot be waived, since Fed. R. Crim. P. 52(a),[2] which parallels §§ 59.041[3] and 924.33,[4] mandated federal appellate courts not to reverse convictions where error is harmless. Id. at 226. Additionally, the government, as does Respondent (RB. 17), maintained that the appellate court must

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[2]Rule 52(a), Federal Rules of Criminal Procedure, provides that: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

[3]Section 59.041 provides that:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury of the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

[4]Section 924.33 provides that:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

search the record, without any help by the parties, to determine that an error is harmful, before reversing a conviction. Id.

The Seventh Circuit, while noting the language of Rule 52(a) was mandatory, held that such language did not make the rule's provision nonwaivable and the government could, by failing to address and prove an error harmless, waive that issue for appellate review. Id. It went on to find, however, that the waiver does not always bind a federal appellate court from engaging in harmless error review. Id.

While holding that it had the discretion to review harmless error sua sponte, the Seventh Circuit established "controlling considerations" which must be met before federal appellate courts may engage in a sua sponte harmless error analysis. They are:

> 1. The length and complexity of the record;
>
> 2. Whether the harmlessness of the error or errors found is certain or debatable; and
>
> 3. Whether a reversal will result in protracted, costly and ultimately futile proceedings in the district [trial] court.

Id. at 127.

Petitioner maintains that this Court should not adopt the federal sua sponte harmless error review standard; it should provide Floridians with greater protections than are available under federal law by prohibiting sua sponte harmless error review. However, even if the Giovannetti sua sponte harmless error review considerations are applied to the instant case, reversal of Appellant's conviction is required.

As Petitioner demonstrated in Point II of his argument (PB. 22-33 and Point II, below), the issue of harmlessness was not certain but highly debatable; that is, the alleged harmlessness of the error was beyond serious debate. Rose v. United States, 629 A. 2d 526, 537 (D.C. App. 1993). Here, when reviewing in a light most favorable to the accused, Lutkins v. South Dakota, 965 F. 2d 1477, 1481 (8th Cir. 1992), the purported

harmlessness in admitting the child-hearsay testimony was not beyond serious debate and the Fourth District should have ended it inquiry and abstained from engaging in sua sponte harmless error review. Rose v. United States, supra.

Moreover, the record on appeal, while not exceedingly complex, is quite lengthy, containing transcripts from multiple trial proceedings. An appellate court should only employ sua sponte harmless error review when the relevant record is reasonably short and straightforward. Pryce v. United States, 938 F.2d 1343, 1348 (D.C. Cir. 1991). Here, nearly the entire record on appeal was inundated with inadmissible child-hearsay evidence issues. The extent to which this error was involved in Petitioner's trial should have precluded the Fourth District from engaging in a sua sponte harmless error analysis. The district court abused its discretion by saddling itself with the heavy burden of wading through the record without the guidance of the parties.

Consequently, under the federal standard, the Fourth District abused its discretion by engaging in sua sponte harmless error review in the instant case. Hence, this Court should quash the decision of the Fourth District and remand for a new trial.

ARGUMENT

POINT II

THE ERRONEOUSLY ADMITTED CHILD-HEARSAY EVIDENCE WAS HARMFUL AND THE FOURTH DISTRICT COURT OF APPEAL ERRED IN UTILIZING INCORRECT FACTORS IN ITS HARMLESS ERROR DETERMINATION.

Respondent's contention that the Fourth District's harmless error analysis was "unartfully worded" (RB. 20) is a prelude to its argument that the district court's determination of child-hearsay inadmissibility was just plain wrong. The State addresses an entirely new premise -- that the child-hearsay was admissible because the trial court did make the requisite statutory findings (which the district court must have missed).

Respondent's proposed "two fold" harmless error analysis is nothing more than an attempt to redirect this Court's attention to questions of what hearsay was admitted in the first place. If the State succeeds in arguing that the district court was wrong in finding the child-hearsay inadmissible, there is no need to address the pressing jurisdictional issue (See Petitioner's Point I).

Although Respondent concedes that the child-hearsay testimony of Child A's mother and Deputy Sheriff Hibbert were erroneously admitted into evidence at Petitioner's trial, agreeing that the trial court's findings were "boilerplate" tracking of the statute (RB. 23), See 90.803(23), Fla. Stat. (1991), the State then argues that the child-hearsay, tape recorded statements elicited by Deputy Sheriff Mansching were properly admitted into evidence at Petitioner's trial (RB. 21). The Fourth District made no such distinction.

The Fourth District unambiguously held that the admission of all child-hearsay was erroneous:

> Appellant first contends the trial court erred when it admitted the testimony of three witnesses who related hearsay statements of the child-victims. He argues the trial court did not set forth the requisite findings of reliability as required by the statute.

Heuss at 1056 [citations omitted]. While the decision does not name names, the evidence establishes that the three witnesses who provided inadmissible child-hearsay are Cindy, [redacted] Deputy Hibbert and Deputy Mansching (they were the only witnesses offered by the State and who testified to child-hearsay statements).

The Fourth District held that:

> In pretrial motions, appellant challenged the trustworthiness and reliability of the child-victims' statements based upon possible contamination of the children's statements as a result of discussions with their parents and other children; leading questions by Child A's mother and the **deputies**; untimeliness of the statements in relation to the events; and the lack of spontaneity of the children's statements. We hold that appellant adequately preserved this issue for appellate review.

Id. [citation omitted][emphasis added]. Here again, the lower tribunal's admissibility analysis included Cindy [redacted] and the two deputies and since only two deputy sheriffs testified at Petitioner's trial, it is indisputable that the district court's opinion referred to Hibbert and Mansching . Finally, after quoting the trial court's child-hearsay reliability findings as to all three witnesses, Id. at 1056-7, and citing this Court's decision in Hopkins v. State, 632 So. 2d 1372, 1377 (Fla. 1994), the Fourth District held:

> We agree with appellant that the findings of the trial court merely track the statutory language of section 90.803(23) and, as such, are insufficient.

Id. at 1057. Thus, the opinion encompasses the child-hearsay testimony of all three witness in question. Its decision finds that none of the three child-hearsay witnesses provided admissible evidence.

Respondent ignores the district court's decision finding error and insists that the tape statement's were admissible (RB. 23, 26). The State justifies its rewriting and revisionist interpretation of the Fourth District's decision by suggesting a "two fold" inquiry, namely:

> 1) Initially, this Court should determine whether the trial court's failure to make findings [of reliability] was harmless because the record establishes that the time, content and circumstances of the victims' statements provide sufficient safeguards of reliability;
>
> 2) If not, then this Court should proceed to determine, after a review of all the properly admitted evidence, whether beyond a reasonable doubt admission of these statements did not affect the verdict.

RB. 21. The reason for the State's imaginative bifurcated approach to child-hearsay harmless error review is understandable. Obviously, the State needs to justify the admission of some of this hearsay, otherwise the Fourth District's reliance on the taped child-hearsay statements to deny Petitioner's judgment of acquittal motions on Counts I and II is indefensible.

The State cites to portions of the record on appeal in an effort to demonstrate when the trial court made sufficient reliability findings (RB. 24-5). Respondent unabashedly cites trial court ramblings which, though paragraphs worth, say little or nothing and do not constitute requisite findings of fact. The Fourth District was correct to determine that these statements by the trial court were insufficient boilerplate; thus, the child-hearsay was inadmissible and the district court correctly held on that point. Where it went astray and erred, however, was in employing a faulty harmless error analysis (PB. 33-22) and doing so sua sponte (P.B. 12-21; See Petitioner's Point I, above).

Respondent's brief fails to substantively discuss the second step of its child-hearsay harmless error analysis, which is part of the important jurisdictional question present here for review (See Petitioner's Point I). Perhaps the State's failure to do so is because it

has no supporting rationale for the Fourth District's sua sponte harmless error analysis. Heuss at 1057-8.

Indeed, it is easier to find no error than to conduct a proper harmless error analysis. This approach avoids the State's problem of convincing this Court that, although the Fourth District was correct in finding the child-hearsay inadmissible, it still mistakenly relied on such "harmlessly admitted" evidence to affirm the denial of Petitioner's judgment of acquittal motions as to Counts I and II (PB. 30-41)(See also Petitioner's Reply Brief, Point III, below). Respondent's contention that the tape statement's were properly, as opposed to harmlessly, admitted into evidence is without factual or legal basis. The State's avoidance of this issue should be viewed by this Court as a confession of error. Consequently, this Court should quash the decision of the Fourth District and reverse and remand for a new trial.

ARGUMENT

POINT III

THE FOURTH DISTRICT ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S JUDGMENT OF ACQUITTAL MOTIONS AS TO COUNTS I AND II, IN THAT THE PROPERLY ADMITTED EVIDENCE FAILED TO NEGATE PETITIONER'S REASONABLE HYPOTHESIS OF INNOCENCE.

Respondent's argument, that there was sufficient evidence to deny Petitioner's motion for judgment of acquittal on Counts I and II requires this Court to find, contrary to the Fourth District's instant decision, Heuss, at 1056-7, that Mansching's tape recorded child-hearsay statements were not erroneously admitted into evidence (See RB. 20-26). Respondent's argument implicitly concedes that without Mansching's erroneously admitted, taped recorded child-hearsay statements, the State's prima facie proof as to Counts I and II fails. Otherwise, the State would have not so laboriously maintained that those statements were properly admitted. Inasmuch as all the child-hearsay testimony was erroneously admitted into evidence, and harmfully so, the Fourth District wrongly affirmed the trial court's denial of Petitioner's judgment of acquittal motions on Counts I and II.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court quash the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Sarah B. Mayer, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 6th day of June, 1996.

IAN SELDIN
Counsel for Petitioner