IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,954

DCA CASE NO. 95-2395

DONNIE HUGH DOCTOR,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

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ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FOURTH DISTRICT COURT OF APPEAL DECISION IN JONES *v.* STATE, *656 So.* 2d 489 (Fla. 4th DCA), *review* denied, 663 *So.* 2d 632 (Fla. 1995).

In Jones *v. State, 656 So.* 2d 489 (Fla. 4th DCA), *review denied, 663 So.* 2d 632 (Fla. 1995), the Fourth District reversed a defendant's conviction where the trial court made extemporaneous comments during jury selection regarding the reasonable doubt standard. The Fourth District deemed that the comments, which indicated that certitude was not required for a jury to return a guilty verdict, served to minimize the reasonable doubt standard and constituted fundamental error.

In the instant case, the Third District has expressly and directly enunciated a conflict with the Fourth District's decision in Jones. The issue presented in the instant case, like the issue presented in *Jones,* is whether extemporaneous statements by the trial court regarding the certitude required to return a guilty verdict constitute fundamental error. The Third District has expressly ruled that it will not follow the Fourth District's decision in *Jones* and has declared that *Jones* is in conflict with the Third District's previous decision in Freeman v. *State, 576 So.* 2d 415 (Fla. 3d DCA 1991). In *Freeman* the Third District held that such complaints do not constitute fundamental error.

It is clear that a conflict exists between the Fourth and Third District courts regarding the propriety and harmfulness of trial judges' extemporaneous comments on the reasonable doubt standard. The conflict warrants the exercise of this Court's

discretionary jurisdiction since uniformity must exist regarding the propriety of trial judges' comments on the burden of proof required before the prosecution in a criminal case has established reasonable doubt. Additionally, this Court has already accepted jurisdiction in Variance *v.* State, -- So. 2d -- (Fla. 4th DCA Case no. 94-3019, January 3, 1996) [21 FLW D79], review granted (Fla. Case no. 87,916, July 19, 1996), a case emanating from the Fourth District and adhering to the ruling in Jones. Petitioner urges this Court to accept jurisdiction in the instant case and thereby settle the conflict presently existing between the Fourth and Third District courts.

CONCLUSION

Based on the foregoing facts, authorities and arguments, Petitioner requests that this Court exercise it's discretionary jurisdiction in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 17th day of September, 1996.

Rosa C. Figarola

ROSA C. FIGAROLA
Assistant Public Defender

Tiffany's, alleging that Tiffany's had breached its duty of reasonable care by serving alcohol to underaged persons who became intoxicated and, thereafter, attacked the claimants.

Tiffany's submitted the individual claims to its premises liability carrier, Scottsdale. Scottsdale insured Tiffany's against premises liability claims, excluding liquor liability claims',[1] while Illinois insured against claims resulting from Tiffmy's furnishing of alcoholic beverages to underage persons.[2] On January 28, 1988, Scottsdale notified Illinois of the lawsuit against Tiffany's and requested that Illinois defend the claim because it was based on liquor liability and Scottsdalc's policy excluded liquor claims. Illinois refused to defend the claim.

Scottsdale defended Tiffany's under a reservation of rights pursuant to Section 627.426, Florida Statutes (1988). After Scottsdale paid $88,286 to settle the claims and accrued $26,610 in attorney's fees and costs, Scottsdale and Tiffany's sued Illinois, seeking a declaratory judgment, alleging that Illinois must indemnify Scottsdale for its attorney's fees and costs incurred in defending the negligence action and for the sums Scottsdale expended in settlement of the claims. Scottsdale and Illinois filed cross summary judgment motions. Scottsdale argued that the claimants' action fell within both policies and that Illinois had a duty to defend and, consequently, to indemnify Scottsdalc. In its motion, Scottsdale requested an award of fifty percent of the settlement funds paid and fifty percent of the attorney's fees and costs incurred in defending Tiffany's. Illinois, on the other hand, argued that there was no coverage because there was no evidence that alcohol had caused the attack. The trial court granted Scottsdale's motion for summary judgment and denied Illinois' motion for summary judgment. Illinois appeals this order.

The trial court properly granted Scottsdale's summary judgment motion regarding indemnification for fifty percent of Scottsdale's attorney's fees and costs incurred in defending the negligence action because both Scottsdalc and Illinois had a concurrent duty to defend their insured. Tiffany's. In determining when an insurer's duty to defend may arise, this court has stated:

> An insurance carrier's duty to defend a claim depends solely upon the allegations in the complaint...[T]he duty to defend is broader than. and distinct from, the duty to indemnify. If the complaint, fairly read, alleges facts which create potential coverage under the policy, the insurer must defend the lawsuit.

Fun Spree Vacations, Inc. v. Orion Ins. Co., 659 So. 2d 419, 421 (Fla. 3d DCA 1995)(citations omitted); *Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.*, 470 So. 2d 810 (Fla. 1st DCA 1985). The claimants' complaint alleged facts sufficient to create potential coverage under both policies. Scottsdale had a duty to defend Tiffany's because the complaint alleged a claim of premises liability. Illinois had a duty to defend because the complaint alleged that Tiffany's had served alcohol to underaged persons, causing their intoxication.

Since Scottsdale's policy excluded liquor liability claims, and the Illinois' policy specifically covered liquor liability claims, Illinois was the primary insurer on the negligence claim and Scottsdale was the excess insurer. "The fact that a carrier which is secondarily liable also had a duty to defend the insured does not relieve the carrier of its right to be indemnified for the cost of defending the insured." *United States Auto. Ass'n v. Hartford Fins. Co.*, 468 So. 2d 545,548 (Fla. 5th DCA), *rev. denied*, 476 So. 2d 676 (Fla. 1985); *see* also Associated *Elect. & Gas Ins. Servs., Ltd. v.* Ranger *Ins. Co.*, 560 So. 2d 242 (Fla. 3d DCA 1990). Accordingly, Scottsdale isentitled to half of the *attorney's fees and costs* that it incurred while defending Tiffany's.

The trial court erred, however, in granting Scottsdale's motion for summary judgment regarding the indemnification of settlement funds because an issue of material fact existed concerning whether the service of alcohol had caused the claimants' injuries. The duty to indemnify is narrower than the duty to defend, and there must be a determination that coverage exists before a duty to indemnify arises. *Baron Oil* Co., 659 So. 2d at 813; *Keller Indus. Inc. v. Employers Mut. Liab. Ins. Co. of Wis.*, 429 So. 2d 779, *780* (Fla. 3d DCA 1983) ("[A]n unjustified failure to defend does not require the insurer to pay a settlement where no coverage exists."); *Pastori v. Commercial Union Ins. Co.*, 473 So. 2d 40, 41 (Fla. 3d DCA 1985) ("[C]ourts have no power simply to create coverage out of the whole cloth when none exists on the face of an insurance contract...."). The record, as it presently exists, fails to prove whether or not the improper service of alcohol by Tiffany's to minors was the proximate cause of the injury or loss suffered by the claimants. We therefore reverse the trial court's order granting Scottsdale's summary judgment motion as to the indemnification for settlement funds, because of the material issue of fact that exists regarding whether the service of alcohol to minors contributed to the claimants' damages. "A summary judgment cannot stand where genuine issues of material fact exist." *Marquez v. Heim Corp.*, 632 So. 2d 85, 86 (Fla. 3d DCA), *rev. denied, Kelly v. Marquez*, 641 So. 2d 1345 (Fla. 1994); *Rothstein v. Honeywell, Inc.*, 519 So. 2d 1020 (Fla. 3d DCA 1987) (reversing final summary judgment because issues of causation, liability, and fraud remained).

Accordingly, this cause is remanded for further appropriate proceedings to allow a factual determination regarding whether the improper service of alcohol caused the injury to the claimants. If it did, Illinois is also liable in indemnification to Scottsdale in connection with the settlement funds. If not, Scottsdale will collect nothing from Illinois in connection with the settlement funds.

Affirmed in part and reversed in part.

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[1] Scottsdale's insurance policy, one of comprehensive general liability. covered bodily injury and property damage. but excluded claims relating "to bodily injury or property damage for which the insured or his indemnity may be held liable as a person or organization engaged in the business of manufacturing, distributing, selling or serving acholic beverages...."

[2] Illinois policy provided coverage resulting from the following: "(1) causing or contributing to the intoxication of any person; (2) the furnishing of alcohol[ic] beverages to a person under the legal drinking age or under the influence of alcohol: or (3) any statute. ordinance or regulation relating to the sale. gift. distribution or use of alcoholic beverages...."

* * *

Criminal law—Jury instructions—Trial court's extemporaneous instruction to jury venire regarding reasonable doubt, to which defendant did not object, did not rise to level of fundamental error

DONNIE HUGH DOCTOR, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2395. L.T. Case No. 94-8554. Opinion tiled August 14, 1996. An Appeal from the Circuit Court for Dade County, Leonard E. Glick, Judge. Counsel: Samek & Besser and Lawrence Besser. for appellant. Robert A. Buttenvonh. Attorney General. and Fleur J. Lobree, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J. and LEVY and SHEVIN, JJ.)

(SHEWN, Judge.) Donnie Hugh Doctor appeals convictions for armed robbery, aggravated battery, and possession of a firearm. We affirm.

During Doctor's trial, prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the jury venire. Defense counsel did not object.

Doctor argues on appeal that the extemporaneous instruction minimized the reasonable doubt standard and rises to the level of fundamental error. Doctor does not raise any error as to the formal jury instructions at the close of the evidence.

We adhere to our decision in *Freeman v.* State, *576 So.* 2d 415 (Fla. 3d DCA 1991), and hold that "the giving of the instruction does not otherwise rise to the level of fundamental error, . . ." *Freeman,* 576 So. 2d *at* 416.

We decline Doctor's invitation to follow *Jones v. State, 656* So. 2d 489 (Fla. 4th DCA), *review denied, 663 So.* 2d 632 (Fla. 1995), as we find it antithetical to our holding in *Freeman.*

Therefore, we affirm Doctor's convictions.

Affirmed. (LEVY, J., concurs.)

(SCHWARTZ, Chief Judge, specially concurring.) In my opinion, the remarks to the jury in this case, in our previous cases of *Freeman v. State*, 576 So. 2d 415 (Fla. 3d DCA 1991) and *Perez v. State*, 639 So. 2d 200 (Fla. 3d DCA 1994), and in the line of Fourth District decisions which began with *Jones v. State*, 656 So. 2d 489 (Fla. 4th DCA 1995), *review denied*, 663 So. 2d 632 (Fla. 1995), *cert. denied*, 116 S.Ct. 1451 (1996),[1] were

1.

not erroneous, Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *Jones*, 656 So. 2d at 491 ("At bar, the trial judge's instructions were accurate as far as they went."); and

2.

if erroneous, were not harmfully so in the light of the complete, and completely accurate instructions repeatedly given the jury on the burden of proof issue, particularly at the most critical time immediately before its deliberations. Esty v. State, 642 So. 2d 1074 (Fla. 1994), cert. denied, 115 S.Ct. 1380 (1995); Higginbotham v. State, 155 Fla. 274, 276-77, 19 So. 2d 829, 830 (1944) ("[A] single instruction cannot be considered alone but must be considered in light of all other instructions bearing upon the same subject, and if, when so considered, the law appears to have been fairly presented to the jury, the assignment on the instruction must fail."); and

3.

if harmfully erroneous, were not fundamentally so since they could easily have been "corrected" upon objection and in no way affected "the validity of the trial itself." See State v. Delva, 575 So. 2d 643, 644 (Fla. 1991); Castor v. State, 365 So. 2d 701 (Fla. 1978); Brown v. State, 124 So. 2d 481 (Fla. 1960).

Cardozo has described the process which I believe may have led to the Fourth District's contrary decisions:

> Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.

Benjamin Cardozo, The Growth of the Law, in Selected Writings of Benjamin Nathan Cardozo 214 (Margaret E. Hall ed. 1947). I concur without reservation in this Court's continued refusal to do the same. (LEVY, Judge, concurs.)

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[1]Accord Reyes v. State, 674 So. 2d 921 (Fla. 4th DCA 1996); Variance v. State, __ So. 2d __ (Fla. 4th DCA Case no. 94-3019, opinion filed January 3, 1996) [21 FLW D79], review granted (Fla. Case no. 87,916. July 19, 1996); Cifuentes v. State, 474 So. 2d 743 (Fla. 4th DCA 1996); Poole v. State, 674 So. 2d 746 (Fla. 4th DCA 1996); McInnis v. State, 671 So. 2d 803 (Fla. 4th DCA 1996); Pierce v. State, 671 So. 2d 186 (Fla. 4th DCA 1996), review granted (Fla. Case no. 87,862, July 1, 1996); Bove v. State, 670 So. 2d 1066 (Fla. 4th DCA 1996), cause dismissed, __ So. 2d __ (Fla. Case no. 88.168. June 6. 1996); Wilson v. State. 668 So. 2d 998 (Fla. 4th DCA 1995), review granted, 672 So. 2d 543 (Fla. 1996): Frazier v. State. 664 So. 2d 985 (Fla. 4th DCA 1995), review denied, 666 So. 2d 145 (Fla. 1995), cert. denied, 116 S.Ct. 1679 (1996); Rayfield v. State, 664 So. 2d 6 (Fla. 4th DCA 1995), review denied, 664 So. 2d 249 (Fla. 1995). cert. denied. 116 S.Ct. 1421 (1996); Jones v. State, 662 So. 2d 365 (Fla. 4th DCA 1995), review denied, 664 So. 2d 249 (Fla. 1995), cert. denied. 116 S.Ct. 1421 (1996).

* * *

Criminal law—Sentencing—Probation revocation—No merit to argument that trial court lacks authority to impose special probation conditions as part of new sentence once defendant is formally charged with a probation violation and brought before the court for a hearing—Case remanded for court to clarify vague probation condition prohibiting defendant from taking any job which would require him to wear a uniform—Court also to clarify vague probation condition regarding visitation with minors

MARC McCORD, Appellant, vs. STATE OF FLORIDA, Appellee. 3rd District. Case No. 95-2115. L.T. Case No. 88-12650. Opinion filed August 14 1996. An Appeal from the Circuit Court for Dade County. Maxine Cohen Lando, Judge. Counsel: Bennett H. Brummer, Public Defender, and Julie M Levitt, Assistant Public Defender, for appellant. Robert A. Butterworth, Attorney General, and Sandra S. Jaggard, Assistant Attorney General, for appellee.

(Before COPE, LEVY, and FLETCHER, JJ.)

ON MOTION FOR REHEARING GRANTED

[Original Opinion at 21 Fla. L. Weekly D1633b]

[Editor's note: Substituted opinion deletcd three sentences fron the fourth paragraph of the original opinion.]

(PER CURIAM.) The opinion filed in this case on July 17, 1996 is vacated and this opinion is substitution in its stead.

Marc McCord (hereinafter "defendant") appeals a nev sentencing order on the grounds that it impermissibly impose special probation conditions and that it does not conform to the trial court's oral pronouncement. While we disagree that the tria court lacks the authority to impose special probation condition as a part of the new sentence once the defendant is formall charged with a probation violation and brought before the cour for a hearing, we agree that the written sentence must conform t the court's oral pronouncement at the sentencing hearing. *See Clark v. State*, 579 So. 2d 109 (Fla. 1991); *Walls v. State*, 59(So. 2d 811 (Fla. 4th DCA 1992).

Howevcr, in order for the written sentence to conform to th oral pronouncement, the latter must bc clear and unambiguous lacking any language which might be considered vague. *See Hal v. State*, 661 So. 2d 63 (Fla. 2d DCA 1995). In the instant case after a thorough rcvicw of the record, we found that the ora pronouncement was vague regarding two conditions. During th February 27, 1996 hearing on the defendant's motion to correc illegal sentence, the court stated that as one of the conditions o probation the defendant could not take any job which woulc require him to wear a uniform. As an example, the court statec that the defendant could not become a security guard. According ly, the case must be remanded to the trial court so that the cour can clarify the probation conditions by specifically indicating th types of jobs that require the wearing of a uniform that woulc violate this prohibition.

The second condition which was vague involved the type o visitation that the defendant was allowed to have with minors The court must clarify the parameters of visitation that the de fendant is allowed to have with his own son, relatives who are o minor age, and other children who are not related to the defen dant. Specifically, the court must indicate whether or not th visitation is to be supewiscd and, if the court finds that supervi sion is a necessary prerequisite of visitation, the court must indi cate which group—son, relatives or unrelated children—need: supervised visitation and which group, if any, does not.

As to appellant's other points, we find them to be withou merit.

Affirmed in part; reversed in part and remanded.

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Criminal law—Speedy trial—Order granting prohibition in DU case on speedy trial ground that county court incorrectly charge continuance to defendant is reversed—Continuance was properly charged to defendant because counsel waited until day of tria before going to county court library to inspect intoxilyzer maintenancc documents, which were made available for inspectior thcrc pursuant to administrative rule, and finding that certain documents were missing—Fact that defendant's counsel hac rcquestcd same missing documents in other case did not elimi nate counsel's obligation in this case—Order declaring count: court's administrative rule invalid is reversed

THE STATE OF FLORIDA, Appellant, vs. WADE HARRILL, Appellee. 3r District. Casc No, 95-3291. L.T. Casc No. 95-18627. Opinion filed August 14 1996. An Appeal from the Circuit Court for Dadc County. Amy Dean, Judge Counsel: Robert A. Butterworth, Attorney General. and Frcdericka Sands Assistant Attorney General, for appellant. Michael A. Catalano, for appellee.

(Before NESBITT, COPE and SHEVIN, JJ.)