IN THE SUPREME COURT OF FLORIDA

JOSHUA D. NELSON,	:	
Appellant,	:	
vs.	:	Case No. 89,540
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Joshua D. Nelson, in reply to the answer brief of the appellee, the State of Florida. Appellant will rely upon the argument presented in his initial brief for Issues II through VII.

References to the record on appeal are designated by a Roman numeral for the volume number, R for the record proper, and T for the trial transcript.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO PROPERLY DETERMINE THE ADMISSIBILITY OF TESTIMONY BY THE STATE'S DNA EXPERT.

In State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), this Court adopted the harmless error rule provided by the United States Supreme Court in Chapman v. California, 386 U.S. 18 (1965). This rule places the burden on the state, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error did not contribute to the conviction or affect the jury's verdict. Chapman, at 23-24; DiGuilio, at 1135. Regardless of state law, the Chapman harmless error standard must be applied to violations of federal constitutional rights, such as those argued in Issues II, III, IV, V, and VI of the initial brief of appellant. Chapman, at 21; see Sochor v. Florida, 504 U.S. 527, 539-540 (1992).

Section 924.051, Florida Statutes (Supp. 1996), provides in part,

> (1) As used in this section:
> (a) "Prejudicial error" means an error in the trial court that harmfully affected the judgment or sentence.
> * * *
> (3) An appeal may not be taken from a judgment or order of a trial court unless a

> prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.
>
> * * *
>
> (7) In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Thus, section 924.051 (7) purports to change the standard of review in criminal appeals by shifting the burden to the appellant to show that an error was harmful.

Appellee contends that section 924.051, Florida Statutes (Supp. 1996), applies to this appeal because Nelson was tried and sentenced after the July 1, 1996, effective date of the statute. Answer Brief, at p. 5. Appellant disagrees. The offense occurred on April 4, 1995. (I, R 1) As a general rule, "an amendment to a criminal statute does not affect the prosecution of, or the punishment for, a crime committed before the amendment." State v. Battle, 661 So. 2d 38, 39 (Fla. 2d DCA 1995); Saavedra v. State, 576 So. 2d 953, 963 (Fla. 1st DCA 1991), affirmed, 622 So. 2d 952 (Fla. 1993), cert. denied, 114 S. Ct. 901, 127 L. Ed. 2d 93 (1994);

Castle v. State, 305 So. 2d 794, 797 (Fla. 4th DCA 1974), affirmed, 330 So. 2d 10 (Fla. 1976); Art. X, § 9, Fla. Const.

The Attorney General has previously insisted in this Court that the provisions of section 924.051, Florida Statutes (Supp. 1996), are substantive in nature. Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996). The general rule of statutory construction is that a "substantive statute is presumed to operate prospectively rather than retrospectively...." Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994); see also, State v. Lavazzoli, 434 So. 2d 321, 323 (Fla. 1983); State v. Kelley, 588 So. 2d 595, 597 (Fla. 1st DCA 1991).

In State v. McGriff, 537 So. 2d 107, 108-109 (Fla. 1989), this Court held that an amendment to the sentencing guidelines statute which changed the appellate standard of review for departure sentences by requiring affirmance when one reason for departure was valid could not be applied to offenses which occurred prior to the effective date of the amendment. The decision in McGriff was premised upon the ex post facto clause of the United States Constitution, Article I, section 10. Appellant concedes that the ex post facto clause of the United States Constitution would not bar retroactive application of a change in the harmless error

standard of review because the change would not alter the definition of criminal conduct or increase the punishment for the crime. See Lynce v. Mathis, 117 S. Ct. 891, 137 L. Ed. 2d 63, 72 (1997).

Nonetheless, the basic principle that new laws must not be retroactively applied should still apply. In Lynce, 137 L. Ed. 2d at 71, the Supreme Court observed,

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Products, 511 U.S. 244, 265 ... (1994).

Moreover, the due process clause protects the interests in fair notice and repose that may be compromised by retroactive legislation. Lynce, 137 L. Ed. 2d at 71 n. 12, quoting, Landgraf, at 266.

Retroactive application of the change in the harmless error standard of review would violate the ex post facto clause of Article I, section 10, Florida Constitution. In Dugger v. Williams, 593 So. 2d 180, 181 (Fla. 1991), this Court construed the state constitution's ex post facto clause:

> In Florida, a law or its equivalent violates the prohibition of ex post facto laws if two conditions are met: (a) it is retrospective in effect; and (b) it diminishes a substantial substantive right the party would have enjoyed under the law existing at the

> time of the alleged offense. Art. I, § 10, Fla. Const.

Retrospective application of section 924.051(7), Florida Statutes (Supp. 1996), would diminish Nelson's right to appeal by shifting the burden to him to show that an error is harmful rather than placing the burden on the state to show that an error is harmless pursuant to DiGuilio.

Moreover, if the Legislature's attempt to change the harmless error standard of review by enacting section 924.051(7), Florida Statutes (Supp. 1996), is deemed procedural instead of substantive, the statute violates the separation of powers provision of Article II, section 3, Florida Constitution:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article V, section 2(a), Florida Constitution gives this Court exclusive jurisdiction to "adopt rules for the practice and procedure in all courts." Enactment of a procedural rule by the Legislature violates separation of powers. See Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976).

Regarding preservation of appellant's pretrial motion in limine which asserted that Esposito's opinion was not based on

generally accepted scientific standards, (II, R 73) appellee asserts that the trial court denied the motion "without prejudice to refile prior to trial. (IV/ R 388-90)" Answer Brief, at p. 9. However, the trial court did not say that the motion had to be refiled. At the pretrial hearing, the court said, "I'm going to deny that motion without prejudice for you to bring it back again prior to the time of trial." (IV, R 390) The court's written order stated, "The Court denies the Motion in Limine/DNA without prejudice, subject to review by the defense experts appointed contemporaneously herein." (IV, R 400)

Regarding Esposito's proffered testimony that his supervisor "consulted a population geneticist who determined that a value of .03 or 3 percent instead of 0 for that particular frequency would be sufficient," (XVI, T 566) appellee asserts, "the geneticist added Owens' gene into the pool and doubled the pool. This method allowed for a finding that the odds were 1 in 300 of finding someone with the particular gene. (XVI/ T 566)" Answer Brief, at p. 8. Appellee's explanation for what the geneticist did is not supported by the record. Esposito gave no such explanation, and the state did not call the geneticist to testify. Appellant also notes that appellee's math is incorrect in that .03 means 3/100, not 1/300.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of October, 1999.

Respectfully submitted,

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