IN THE SUPREME COURT OF FLORIDA

SHAWN THOMAS, :

Petitioner, :

v. : CASE NO. 91,719

STATE OF FLORIDA, :

Respondent. :

_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The issue in this case is whether a judge's written answer to a jury question during deliberations without either notice to or input from the attorneys or defendant is waived by defense counsel's failure to object when later given an opportunity.

During deliberations in Thomas' trial on charges of sale of cocaine and possession of cocaine, the judge announced to the attorneys that the jury had sent him a question concerning a discrepancy in the year written on State Exhibits 1 and 2, the bag containing purported cocaine and the laboratory report. (T108)[1] The judge informed counsel that he had directed the bailiff to "advise the jury that they should consider that as

[1]Herein, citations to the first volume of the record, which includes documents and the sentencing transcript, appear as (R[page number]). References to the supplemental record, which contains the trial transcript, are designated (T[page number]).

part of the evidence and continue to deliberate on their verdict." The court asked counsel if either had an objection. (T108) Both replied in the negative, but defense counsel asked if the judge had communicated with the jurors strictly through the bailiff. (T109) The judge replied in the affirmative. (T109, Appendix B) Immediately after this exchange, the jury returned and rendered its verdict finding Thomas guilty of sale of cocaine and possession of cocaine as charged. (R13-14, T109)

On appeal, Thomas argued that, in answering the jury's question without notice to counsel and without conducting the jury into the courtroom, the judge violated Florida Rule of Criminal Procedure 3.410 and committed per se reversible error under Ivory v. State, 351 So. 2d 26 (Fla. 1977), Curtis v. State, 480 So. 2d 1277 (Fla. 1985), State v. Franklin, 618 So. 2d 171 (Fla. 1993) and Mills v. State, 620 So. 2d 1006 (Fla. 1993).

The district court affirmed, stating:

> Although such a violation of rule 3.410 would ordinarily constitute per se reversible error under Ivory v. State, 351 So. 2d 26 (Fla. 1977), here we conclude that the appellant's trial counsel affirmatively waived the issue by communicating to the trial judge his acceptance of the procedure employed when later given an opportunity to object.

Thomas v. State, 700 So. 2d 734 (Fla. 1st DCA 1997) (Appendix A).

Thomas, the petitioner, seeks conflict review of the district court decision.

SUMMARY OF THE ARGUMENT

The trial court committed per se reversible error in neglecting to comply with Florida Rule of Criminal Procedure 3.410 when it communicated to the jury through the bailiff in reply to a question about the case. The exchange between judge and jury concerning a discrepancy in the date appearing on two pieces of evidence took place without notice to counsel and without conducting the jury into the courtroom, as required by Rule 3.410. This is forbidden under Ivory v. State, 351 So. 2d 26 (Fla. 1977), in which this Court erected the prophylactic rule that such error is per se reversible, a rule to which the Court continues to adhere.

The district court acknowledged the trial court's error, consistent with Curtis v. State, 480 So. 2d 1277 (Fla. 1985), and Bradley v. State, 513 So. 2d 112 (Fla. 1987). However, the First DCA erred in construing counsel's acquiescence in the trial court's *fait accompli* as an affirmative waiver. The opportunity to object to the violation after the fact was insufficient to cure the error. Woods v. State, 634 So. 2d 767 (Fla. 1st DCA 1994). Declining to make an objection after the fact does not amount to waiver of the fundamental due process guarantees of notice, presence and an opportunity to be heard concerning communications between judge and jury. The district court's perspective, if approved, would eviscerate the prophylactic rule

of Ivory and force defense counsel tardily informed of an improper communication to make an untenable choice between seeking a last-minute mistrial and accepting the judge's representation of events.

Waiver of a judge's presence during portions of a trial cannot be implied from failure to make a timely objection. Such waiver must be knowingly and intelligently made by the accused. Bryant v. State, 656 So. 2d 426 (Fla. 1995); Brown v. State, 538 So. 2d 833 (Fla. 1989). Similarly, under Coney v. State, 653 So. 2d 1009 (Fla. 1995), waiver of a defendant's right to be present at the immediate site of the exercise of peremptory challenges requires an inquiry of the defendant to determine if the choice is knowingly and intelligently made. Consistent with these decisions, waiver of the defendant's right to be present for judicial communications with the jury during deliberations must be personal. No such waiver occurred here.

For these reasons, petitioner prays that this Court will quash the district court decision and remand with directions to reverse his convictions.

ARGUMENT

PER SE REVERSIBLE ERROR, CAUSED WHEN A JUDGE RESPONDS TO A JURY QUESTION DURING DELIBERATIONS WITHOUT CONDUCTING THE JURORS INTO THE COURTROOM OR PROVIDING NOTICE TO COUNSEL, IS NOT WAIVED BY COUNSEL'S FAILURE TO OBJECT WHEN INFORMED OF THE COMMUNICATION AFTER THE FACT.

The record reflects that the judge informed counsel of a communication with the jury that had taken place outside the courtroom and without the presence of counsel. The judge stated that, through the bailiff, the jury had asked about a discrepancy on the dates of two exhibits. The judge said he had the bailiff tell the jurors to consider those facts as part of the evidence and to continue to deliberate. (T108) Asked if he objected to this procedure, counsel responded in the negative, then asked the judge if he had communicated with the jurors strictly through the bailiff. (T109) The judge said he had. (T109, Appendix B)

Thomas raised the improper communication as an issue on appeal, drawing a terse affirmance from the district court:

> The appellant contends that his convictions should be reversed because the trial judge committed error when he sent an instruction to the jury during its deliberations without first notifying the prosecutor and defense counsel and giving them an opportunity to discuss the proposed instruction. *See* Fla. R.Crim. Pro. 3.410. Although such a violation of rule 3.410 would ordinarily constitute per se reversible error under Ivory v. State, 351 So. 2d 26 (Fla. 1977), here we conclude that the appellant's trial counsel affirmatively waived the issue by communicating to the trial judge his acceptance of the procedure employed

> when later given an opportunity to object. We accordingly affirm the convictions.

Thomas v. State, 700 So. 2d 734 (Fla. 1st DCA 1997). Florida Rule of Criminal Procedure 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the court-room by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

In Ivory v. State, 351 So. 2d 26 (Fla. 1977), this Court held that per se reversible error occurs when the trial court responds to a question from the jury without first giving counsel prior notice and an opportunity to contribute to the decision on an answer. The court observed that communications between judge and jury outside the parties' presence is "so fraught with potential prejudice that it cannot be considered harmless." Id. at 28. The court reaffirmed the rule of per se reversibility for violations of Rule 3.410 in Curtis v. State, 480 So. 2d 1277 (Fla. 1985), Bradley v. State, 513 So. 2d 112 (Fla. 1987), and State v. Franklin, 618 So. 2d 171 (Fla. 1993).

In Curtis, this Court concluded that the failure to provide notice to counsel or to answer the jury's question in open court constituted error, even though the response to the jury's

question about an aspect of the evidence was neutral in content. 480 So. 2d at 1277, 1278 n.2. In Bradley, without notifying counsel or bringing the jury into court, the judge responded in writing to a question about a police report, stating that it was not in evidence. This Court concluded that the judge committed reversible error because the question and answer triggered the requirement Rule 3.410 that the judge respond to the jury's question in open court. 513 So. 2d at 114.

The district court correctly concluded that the trial court erred. Contrary to Curtis and Bradley, the trial judge neither provided advance notice nor responded in open court. As in Curtis and Bradley, the content of the response, to consider the discrepancy as part of the evidence, made it an additional instruction compelling compliance with Rule 3.410. Indisputably, the trial court violated the rule.

The First DCA was mistaken, however, in concluding that the error was waived. The district court acknowledged that "ordinarily" Ivory would compel reversal in these circumstances, but affirmed because counsel "communicat[ed] to the trial judge his acceptance of the procedure employed when later given an opportunity to object." 700 So. 2d at 734. The district court, which cited no authority for this proposition, read too much into counsel's acquiescence to the trial judge's *fait accompli*. To retain its effectiveness as a prophylactic device, the rule of

per se reversal must apply regardless of counsel's forbearance from an objection when informed of the violation of Rule 3.410 after the fact. The error cannot be efficiently or reliably corrected after it has occurred.

In Woods v. State, 634 So. 2d 767 (Fla. 1st DCA 1994), the district court expressly rejected the state's claim that the issue was not preserved because Woods did not specifically object to the failure to discuss the question and response. Id. at 768. Quoting a 1993 opinion by this Court, the 1st DCA concluded that an opportunity to object to a violation of Rule 3.410 after the fact does not cure the error:

> In fact, it was only after the jury had retired to deliberate further that counsel was given an opportunity to place his objections on the record to the court's denial of the jury's request. In Mills v. State, 620 So. 2d 1006 (Fla. 1993), the trial court responded to a question from the jury, and only afterward gave counsel an opportunity to present argument and objections. The supreme court reversed, noting,
>
> > There is a substantial difference between allowing discussion before the question is answered and allowing discussion after the question is answered and the jury is sent back to deliberate. It is unrealistic to believe a judge would be equally willing to encompass defense counsel's suggestions in both situations, and it is impossible to tell how the judge would have reacted to counsel's suggestions had they been made before the question was answered.
>
> Id. at 1008.
>
> > Although the defendant in Mills specif-

> ically objected to the court's failure to follow proper procedure, we think the language quoted above is instructive. The purpose of a specific objection is to direct the trial court's attention to the purported error in a way that would permit the court to correct the error in a timely fashion.

634 So. 2d at 768-9. Cf. Meyer v. Singletary, 610 So. 2d 1329 (Fla. 4th DCA 1992) (appellate counsel ineffective in failing to raise improper communications between judge and jurors on direct appeal, even though not preserved by objection at trial).

Although the defense lawyers in Woods and Mills objected after the fact while Thomas' counsel communicated his acceptance of the judge's actions, this cannot be a dispositive distinction if the concern is whether the error can be remedied in a timely fashion. The rationale of the cited decisions, that nothing the court can do after the fact is likely to be of any significance, applies regardless of whether counsel objects when informed by the court of the communication. Compare Humble v. State, 652 So. 2d 1213 (Fla. 1st DCA 1995) (counsel who did not act on opportunity to object during reinstruction waived issue). Accordingly, the prophylactic rule of per se reversal adopted in Ivory v. State, 351 So. 2d 26 (Fla. 1977) required reversal here.

A decision to the contrary puts counsel to the Hobson's Choice of seeking a mistrial at the last possible moment, during jury deliberations, or accepting on faith the judge's representations of events outside the parties' presence. More than a

century ago, the Washington Supreme Court spoke eloquently to this point in a case in which the judge entered the jury room during deliberations:

> [T]he law does not subject parties litigant to the disadvantage of being required to accept the statement of even the judge as to what occurs between himself and the jury at a place where the judge has no right to be, and where litigants cannot be required to attend. It is the lawful right of a party to have his cause tried in open court, with opportunity to be present and heard in respect to everything transacted. It is his right to be present and attended by counsel whenever it is found necessary or desirable for the court to communicate with the jury, and he is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the judge and jury at any time or place when he has no lawful right to be present. His right in this respect goes the very substance of trial by jury.

State v. Wroth, 15 Wash. 621, 623-24, 47 P. 100 (Wash. 1896), overruled on other grounds, State v. Caliguri, 664 P. 2d 466 (Wash. 1983). Uniform application of Rule 3.410 and Ivory leaves no occasion for a defendant to depend on the memory or sense of fairness of the judge.

Finally, the district court's finding that defense counsel affirmatively waived the error is a misapplication of the law of waiver. As noted in Wroth, the accused's right to be present during, and have input into, judicial communications with the jury, is fundamental to American criminal justice. In clearly reaffirming its commitment to the per se reversible rule of Ivory

in State v. Franklin, 618 So. 2d 171 (Fla. 1993), this Court noted that due process requires that the defendant and defendant's counsel be afforded the opportunity to be present whenever the judge communicates with the jury. Id. at 173. Waiver of this right cannot be presumed merely from the lack of an after-the-fact objection by counsel. Such waiver must be knowingly, intelligently made by the accused.

In Brown v. State, 538 So. 2d 833 (Fla. 1989), this Court held that the presence of the judge cannot be waived when a jury wishes to communicate with the court during deliberations, because "[t]he possibility of prejudice is so great in this situation that it cannot be tolerated." Id. at 836. In Bryant v. State, 656 So. 2d 426 (Fla. 1995), this Court quoted Brown in holding that the judge's presence during a readback of testimony may be waived not by failure to make a timely objection, but "by a fully informed and advised defendant, and not by counsel acting alone." Id. at 429. Similarly, under Coney v. State, 653 So. 2d 1009 (Fla. 1995)[2], waiver of a defendant's right to be present at the immediate site of the exercise of peremptory challenges requires an inquiry of the defendant. In the alternative, the accused could personally ratify counsel's actions taken in his or her absence.

[2]Superseded, Amendments to Florida Rules of Criminal Procedure, 685 So. 2d 1253 (Fla. 1996).

Consistent with these decisions, waiver of the defendant's right to be present for judicial communications with the jury during deliberations must be knowingly and intelligently made by the defendant. No such waiver occurred here. The record does not even reflect that Thomas was present when counsel declined to object to the judge's communications with the jury. The record contains no indication either that he personally waived his right to be present during the communication, or that he personally ratified counsel's forbearance from objection.

Accordingly, neither Thomas nor his counsel waived the per se reversible error committed by the trial court during deliberations in communicating with the jury concerning the case outside of open court and without notice to counsel. The decision of the district court should be quashed and the case remanded with directions to reverse Thomas' convictions and remand for a new trial.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court quash the decision of the district court and remand with directions to reverse Thomas' convictions and remand for a new trial.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Carolyn J. Mosley, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this ___ day of September, 1999.

Respectfully submitted
& Served,

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