IN THE SUPREME COURT OF FLORIDA

SHAWN THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,719

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

CAROLYN J. MOSLEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 593280

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

RULES AND CONSTITUTIONAL PROVISIONS

OTHER CITATIONS

PRELIMINARY STATEMENT

Petitioner will be referred to by his last name, petitioner, or defendant, and respondent will be referred to as "State." The record on appeal consists of two unnumbered volumes. The one containing the pleadings, etc. will be referred to as "V1," and the other one, containing the trial transcript, will be referred to as "V2." The appropriate page number will follow each volume reference. For example: (V1, 3); (V2, 100).

STATEMENT OF THE CASE AND FACTS

With respect to the issue raised, the State accepts Thomas' statement of the case and facts, but quotes verbatim the colloquy between the judge and the lawyers.

The following colloquy took place after jury deliberations commenced but before a verdict was announced:

> THE COURT: Before the jury returns, let me advise you that shortly after the jury went back in to the jury room, the bailiff brought to me the State's Exhibit 1 and 2 and advised that the jury had a question with regard to the date on the lab report and on the Exhibit 1. I advised him that -- he pointed out to me that the date on Exhibit 1 was 3-1-95 and the lab report was '96. I advised him to advise the jury that they should consider that as part of the evidence and continue to deliberate on their verdict. So, I did not feel that any other instruction was necessary because there was nothing said by me to them other than to continue to deliberate. **Do either one of you have an objection to that process?**
> MR. EVANS [PROSECUTOR]: No, Your Honor.
> **MR. HOLTON [DEFENSE COUNSEL]: No, sir. I take it you didn't communicate directly with the jury, just with the bailiff?**
> **THE COURT: Through the bailiff, right. (V2, 108-109)**
> (emphasis supplied)

SUMMARY OF ARGUMENT

No criminal defendant, through his lawyer, is permitted to lie to the trial judge by expressly telling him that he does not object to the procedure used to communicate with the jury, and after his trial strategy has failed to produce the desired result, tell the appellate court that he does object to that procedure and obtain a new trial.

To sanction such conduct would destroy the adversary system as we now know it. The trial judge could no longer rely on anything defense counsel said, and he would have to take an active role in the trial, dealing directly with the defendant and disrupting the attorney-client relationship. It also would irreparably damage the integrity of the court, for lying is the antithesis of its truth-seeking function. A defendant who tells the trial judge he does not object and then tells the appellate court that he does object has lied. The use of different lawyers will not excuse the lie.

Thomas devotes much of his brief to either undisputed issues--(1) trial judge violated Fla.R.Crm.P. 3.410 and (2) violation of Fla.R.Crm.P. 3.410 is *per se* reversible error; or to irrelevant issues--(1) defendant's state and federal constitutional right to his and the judge's presence at court proceedings and (2) defendant's right to be present under Fla.R.Crm.P. 3.180.

Each right has its own body of law and is not interchangeable. For example, Fla.R.Crm.P. 3.410 does not even require the

defendant’s presence. Nevertheless, a violation of that rule is *per se* reversible error. On the other hand, a violation of Rule 3.180 is subject to harmless error analysis, as is the denial of the defendant’s federal constitutional right to be present during all critical stages of the proceeding and to be represented by counsel.

ARGUMENT

ISSUE I

IS A CRIMINAL DEFENDANT, THROUGH HIS LAWYER, PERMITTED TO LIE TO THE TRIAL JUDGE BY EXPRESSLY TELLING HIM THAT HE DOES NOT OBJECT TO THE PROCEDURE USED TO COMMUNICATE WITH THE JURY, AND AFTER HIS TRIAL STRATEGY HAS FAILED TO PRODUCE THE DESIRED RESULT, TELL THE APPELLATE COURT THAT HE DOES OBJECT TO THAT PROCEDURE AND OBTAIN A NEW TRIAL? (RESTATED)

This case is not about whether error occurred. The record establishes the trial judge's communication with the jury without complying with Florida Rule of Criminal Procedure 3.410, as construed by this Court. Neither is this case about the nature of the error. State v. Franklin, 618 So.2d 171, 173 (Fla. 1993) ("We ... reaffirm the per se reversible error rule....").[1] Finally, this case is not even about the requirement of a contemporaneous objection. Castor v. State, 365 So.2d 701, 703-704 & n. 5 (Fla. 1978); Clark v. State, 363 So.2d 331, 333 (Fla. 1978), *overruled on other grounds*, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

[1]The *per se* reversible error rule is apparently the minority view. John Ludington, Postretirement Out-of-Court Communications Between Jurors and Trial Judge as Grounds for New Trial or Reversal in Criminal Case, 43 A.L.R.4th 410 (1986; 1997 Supp.). Cf. Mendoza v. State, 700 So.2d 670, 674 (Fla. 1997).

What this case is about is a criminal defendant, who, through his attorney, told the trial judge that he did not object to the procedure used, and after his trial strategy failed to produce the desired result, told the appellate court that he does object to the procedure used. Thomas unabashedly asserts his entitlement to take opposite positions with the trial and appellate courts. (I.B. 5,9,11-12) In other words, he contends that he has an absolute right to allow known error to go uncorrected during the course of the trial, even if it means expressly lying to the trial judge, to guarantee himself a second trial in the event of a conviction.

Authority contrary to Thomas' position is legion. See e.g., Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974) ("It is well-established law that where the trial judge has extended counsel an opportunity to cure any error, and counsel fails to take advantage of the opportunity, such error, if any, was invited and will not warrant reversal"), *cert. denied*, 428 U.S. 911 (1976); Farinas v. State, 569 So.2d 425. 429 n. 7 (Fla. 1990) (same); Castor v. State, 365 So.2d at 703-704 ("Nor did trial counsel object, before or after re-instruction, to the trial court's failure to follow our rule regarding the procedure for submitting to counsel all responses to a jury's questions. His failure to do either not only prevented the judge from correcting an inadvertent error, but it produced the delay and systemic cost which result from invoking both levels of the state's appellate

structure for the application of a legal principle which was known and unambiguous at the time of trial. *** Inasmuch as trial counsel for Castor did not present the trial court with an opportunity to cure a legal but non-fundamental error, we affirm the decision of the district court declining to consider the error on appeal"); Clark v. State, 363 So.2d at 335 (defendant "will not be allowed to await the outcome of the trial with the expectation that, if he is found guilty, his conviction will be automatically reversed"); State v. Rhoden, 448 So.2d 1013 (Fla. 1984) (contemporaneous objection "rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant"); State v. Lucas, 645 So.2d 425, 427 (Fla. 1994) (court recognizes exception to fundamental error doctrine "where defense counsel affirmatively agreed to or requested the incomplete instruction"); Armstrong v. State, 579 So.2d 734, 735 (Fla. 1991) ("By affirmatively requesting the instruction he now challenges, Armstrong has waived any claim of error in the instruction").

Contrary to Thomas' assertion, he did not face a Hobson's choice between two competing rights. Thomas had the right to one jury trial free of reversible error; he did not have the right to two jury trials, one with error and one without error. Neither was Thomas under any duty to believe the judge, for he had a

right to a new trial regardless of whether he thought the judge was being honest. All he had to do was ask for a new trial, and that he did not do.

The reason for Thomas' decision is unknown, but one reason immediately comes to mind. Defense counsel believed the error was harmless, as would be the view of most other state courts. Thomas had no reason to doubt the trial judge's explanation. There was no evidence that the trial judge wanted to frame or convict Thomas, or that he was willing to pay the price for such conduct. After all, other persons (bailiff and jurors) were privy to the communication, and the judge lacked the power to silence them forever. Moreover, the trial judge probably told the jurors what defense counsel would have wanted him to tell them. Finally, a new trial would have benefitted the prosecution, not the defense. At a new trial, the State could have clarified the ambiguity and made its case even stronger.

Thomas cites eight cases construing Rule 3.410. In not one of the eight cases was the defendant, through counsel, permitted to tell the trial judge that he had no objection and still obtain a new trial on appeal. Ivory v. State, 351 So.2d 26, 27 (Fla. 1977) ("After the jury had the [medical] report for approximately 45 minutes, the trial judge ordered it withdrawn, whereupon the defendant filed a motion for mistrial"); Mills v. State, 620 So.2d 1006, 1007 (Fla. 1993) ("After the jury left the courtroom, defense counsel objected to the fact that he did not get a chance

to discuss the question. He asked the judge to read the entrapment instruction to the jurors so that they would be given a more complete answer to their question. The judge noted the objection and refused defense counsel's request."). In Woods v. State, 634 So.2d 767, 767-769 (Fla. 1st DCA 1994), the First District held that the issue was properly preserved where "defense counsel asked the court to reconsider its decision and to read back a portion of the expert's testimony to the jury," and the court refused.

In other cases, the opinion is silent on how or when defense counsel learned of the communication and what his response was: Curtis v. State, 480 So.2d 1277 (Fla. 1986) (opinion indicates defense counsel may have had actual notice of jury's questions, but record is silent as to defense counsel's actual knowledge of the *ex parte* communication); State v. Franklin, 618 So.2d 171 (Fla. 1993); Bradley v. State, 513 So.2d 112 (Fla. 1987); **or** there was no error: Brown v. State, 538 So.2d 833, 834 (Fla. 1989) ("We find no violation of rule 3.410 here...").

In Meyer v. Singletary, 610 So.2d 1329 (Fla. 4th DCA 1992), cited by Thomas, the Fourth District held that the issue could be raised without an objection. The Court's rationale is not entirely clear. It states that "if the error or impropriety rises to the level of a due process violation, constitutional violation, or another matter of fundamental error," no objection at trial is required. *Id.,* at 1331. The opinion, however, does

not mention Castor, Clark, or even Hill v. State, 549 So.2d 179, 182 (Fla. 1989) (due process claims must be preserved for appeal). Moreover, what was under review in Meyer was violation of a judicially-created rule of criminal procedure, and no matter how noble its purpose, it was still just a rule. Whether the trial judge's conduct violated the due process clause was an entirely separate issue, with its own body of law. The State notes that as to that issue, the harmless error test applies. Rushen v. Spain, 464 U.S. 114, 117-122 & n. 2 (1983). At any rate, defense counsel in Meyer never told the judge he had no objection to the procedure used, as did defense counsel in the instant case.

Thomas merges the analysis of Rule 3.410 with the analysis of another judicially-created procedural rule and of certain provisions of the state and federal constitutions. This case is about a violation of Rule 3.410; it is not about a violation of Rule 3.180, nor is it about a violation of either art. 1, § 16, Fla. Const. or U.S. Const., 6th amend.

Rule 3.410 requires the trial judge to communicate with the deliberating jury in the courtroom and to notify the lawyers first. It does not require the defendant's presence. In Meek v. State, 487 so.2d 1058, 1059 (Fla. 1986), this Court held:

> During its deliberations, the jury asked:
>
> > If one person is guilty of premeditated first degree murder and the other person meets all criteria set forth in instruction 3.01, principal, are both guilty of first degree premeditated murder?
>
> Petitioner was in a nearby restaurant awaiting the verdict but the judge conferred with the prosecutor and

> defense counsel and all agreed the answer was yes. The jury was then brought into open court and the question answered without petitioner's presence.
> ***
> We agree with the district court that notification of counsel was sufficient under rule 3.410 and that no violation of the rule occurred. *** In the years since *Ivory* issued, we have not amended rule 3.410 to require the presence of the defendant, in addition to counsel, and did not intend by the language in *Ivory* to establish such requirement. (emphasis supplied)

See also, Morgan v. State, 492 So.2d 1072, 1073-1074 (Fla. 1986); Roberts v. State, 510 So.2d 885, 891 (Fla. 1987); Hildwin v. State, 531 So.2d 124, 126-127 (Fla. 1988).

Since Rule 3.410 does not require the defendant's presence, there can be no rational reason for requiring his personal waiver. It is counsel who should object, and it is counsel who can ratify the procedure after the fact, as was done in the instant case.

Thomas cites Brown, supra, Byrant, infra, and Coney, infra. In Brown v. State, 538 So.2d at 834-836, this Court held that there was no violation of Rule 3.410, but that there was a violation of the state and federal constitutions, and as to the constitutional right involved (presence of judge), it could not be waived: "[W]e hold that the judge's presence cannot be waived when a jury wishes to communicate with the court during its deliberations." Bryant v. State, 656 so.2d 426 (Fla. 1995) does not even mention Rule 3.410; it, like Brown, involved a constitutional violation. There, the judge was not present for the reading of the transcript by the court reporter. In both

Brown and Bryant, the lawyers, but not the defendant, had agreed to the trial judge's absence. Bryant suggests that the judge's presence can be waived, but only by the defendant. *Id.,* at 429. Coney v. State, 653 So.2d 1009 (Fla. 1995) involved Rule 3.180, which addressed the defendant's right to be present at trial proceedings. This particular right must be waived by the defendant, but on the other hand, violation of the rule is subject to harmless error analysis.

Thomas further contends that he is entitled to a new trial because of a silent record. (I.B. 13-14) This too is a common defense argument. The law in this Court has been to the contrary for at least seventy years. In O'Steen v. State, 111 So. 725 (1927) (syllabus by Court, 6, 8), this Court held:

> 6. Defendant's counsel should object and except, if defendant is not present when necessary, and see that record affirmatively shows his absence. If so fundamental a right of the defendant be violated, it is the duty of his counsel to make due objection and exception thereto, and to see to it that the record brought up on writ of error affirmatively shows such absence of the defendant.
>
> 8. *** It is a general rule of wide application that an appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment or decree from which the appeal was taken. Error is never presumed on appeal, but the burden of showing error affirmatively is upon the appellant or plaintiff in error who alleges it, and the appellate court will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to affirm the decision of the First District in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

_____
CAROLYN J. MOSLEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 593280

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# L97-1-14539]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Glen P. Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of March, 1998.

_____
Carolyn J. Mosley
Attorney for the State of Florida

[C:\USERS\CRIMINAL\PLEADING\97114539\THOMASBA.WPD --- 9/14/99,1:39 PM]