IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,805

HERBERT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.
_____/

AMENDED MERIT BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

MICHAEL A. WASSERMAN #0003077
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in 12 point Courier New, a font that is not proportionately spaced.

Petitioner was the appellant in the First District Court of Appeal and the defendant in the circuit court, and will be referred to as petitioner or by proper name in this brief. Respondent was the appellee and the prosecution respectively. A five volume transcript, including the record on appeal, motion hearings, jury selection, jury trial, and sentencing, will be referred to as "I, II, III, IV, or V."

STATEMENT OF THE CASE

1. Introduction

The district court certified the following question to this Court regarding the application of the new harmless error test set forth in Section 924.051(7), in light of this Court's opinion in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986):

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN DIGUILIO V. STATE, 491 So. 2d 1129 (Fla. 1986)?

A notice to invoke discretionary jurisdiction of this Court was filed August 27, 1998. This Court subsequently entered an order setting a briefing schedule.

2. History of Proceedings

Herbert Jones was arrested on August 1, 1996 and by information filed August 22, was charged with sexual battery and armed robbery (I-7-9). The cause proceeded to trial on February 4, 1997 (II-130). The jury found Mr. Jones guilty as charged (I-89-90; V-496). Mr. Jones was adjudicated guilty and sentenced to 22.7 years state prison on Count I and a concurrent 22.7 year sentence on Count II (I-96-101; 152).

STATEMENT OF THE FACTS

Herbert Jones was charged with sexual battery and armed robbery of Linda Smith (I-7-9). The trial court admitted evidence of Melodie Smith's abduction and Mr. Jones' arrest for this abduction because it was "factual evidence germane to the case being tried (II-110)." Melodie Smith detailed her entire encounter with Mr. Jones, beginning with how she was apprehensive when she noticed Mr. Jones at the ATM, and continued by detailing the entire drive from the parking lot to the Market Square Mall (III-243-253). During Melodie Smith's testimony, a photograph of Mr. Jones standing with his hands cuffed behind his back and in front of a marked patrol car was admitted into evidence (III-250-251). Ivan Pena, the officer that arrested Mr. Jones after the subsequent criminal offense, testified to Melodie Smith's demeanor when he first encountered her, described Mr. Jones' arrest in the mall for this offense, and discussed a gun Melodie Smith believed Mr. Jones possessed[1] (III-259-269). Finally, Mark Hatton, the crime scene investigator, testified to his discovery of the ATM card in the trash can (III-269-277).

[1]There was no gun used in the instant case.

SUMMARY OF ARGUMENT

The harmless error test set forth in Section 924.051, Florida Statutes (1995), unconstitutionally thwarts an appellant's legitimate appellate rights by shifting the burden of proving harmful error from the beneficiary of the error to the victim of the error. It also violates the separation of powers by attempting to establish procedures for appellate review. Establishing the appropriate standard for appellate review is inherent in this Court's rule-making authority. Nor does the statute define the burden of proving harmful error with sufficient specificity. Finally, the issue in the present case raises a violation of Mr. Jones' constitutional right to a fair trial, so that the harmless error test of Chapman v. California, 386 U.S. 18 (1967) and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), apply.

ARGUMENT

ISSUE PRESENTED:

> THE HARMFUL ERROR TEST DEFINED IN SECTION 924.051(7), FLORIDA STATUTES (1995), IS UNCONSTITUTIONAL AND SHOULD NOT BE APPLIED IN THE PRESENT CASE.

In its decision in the instant case, the First District Court of Appeal affirmed Mr. Jones' conviction, holding that he had not demonstrated that his trial contained prejudicial error, as required by section 924.051(7), Florida Statutes and Goodwin v. State, 23 Fla. L. Weekly D918 (Fla. 4th DCA April 8, 1998) on rehearing denied D1538 (Fla. 4th DCA June 24, 1998). The district court certified the following question to this Court:

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN DIGUILIO V. STATE, 491 So. 2d 1129 (Fla. 1986).

In State v. DiGuilio, this Court rejected the application of a reversible error per se rule when faced with an erroneously admitted comment on the defendant's right to remain silent. Instead, this Court adopted the harmless error test from Chapman v. California, 386 U.S. 18 (1967), which it noted was consistent with 924.33[2], Florida Statutes. 491 So. 2d at 1134, n.9. Recognizing

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[2]"No judgement 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."

that "the authority of the legislature to enact harmless error statutes is unquestioned," this Court nevertheless explained that Section 924.33, Florida Statutes, passed constitutional muster since it "respects the *constitutional* right to a trial free of harmful error but directs appellate courts *not* to apply a standard of review which requires that trials be free of harmless errors." Id. (Emphasis added in part, original in part). Chapman and thus DiGuilio, placed the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict on the beneficiary of the error. 491 So. 2d at 1135. This Court observed that the defendant's *constitutional right to a fair trial* was preserved by this procedure, despite DiGuilio's rejection of an automatic reversal rule, because the burden of showing harmlessness was placed on the beneficiary of the error:

> The combination of the fairly susceptible test and the harmless error rule is a happy union. It preserves the *accused's constitutional right to a fair trial* by requiring the state to show beyond a reasonable doubt that the specific comment(s) did not contribute to the verdict.

491 So. 2d at 1136 (emphasis added). This Court also explained that placing the burden on the beneficiary of the error deters a party from purposely committing strategic error:

> *In view of the heavy burden the harmless error rule places on the state*, it further serves as a strong deterrent against prosecutors advertently or inadvertently commenting on an accused's silence. It cannot be rationally argued that commenting on an accused's silence

> is a viable strategy for obtaining convictions.

491 So. 2d at 1136 (emphasis added). This Court made it unequivocally clear that the burden *must* remain with the beneficiary of the error:

> The burden to show the error was harmless *must* remain on the state.

491 So. 2d at 1130 (emphasis added).

Recently, this Court has held that the legislature may not place conditions on the constitutional rights to appeal which "thwart the litigants' legitimate appellate rights." In re Amendments to the Florida Rules of Procedure, 685 So. 2d 773, 774 (Fla. 1996). Am appellant's legitimate appellate right to a fair appeal and a fair trial is thwarted by the shifting of the burden of proving the prejudicial or nonprejudicial nature of the error from the beneficiary of the error to the victim of the error.

Thus, while the legislature has the power to discourage courts from reversing a conviction in the absence of prejudice to the defendant, its scheme must nevertheless satisfy constitutional concerns for the defendant's *right to a fair trial*. Section 924.051(7), by shifting the burden of proving prejudice to the victim of the error thwarts legitimate appellate rights, ignores constitutional safeguards, and cannot be countenanced by the courts.

This conclusion is buttresses by the fact that since July 1,

1996, every appellate court in Florida -- including this Court -- has reversed at least one case under the harmless error standard (including the placement of the burden on the State to show harmless error) as set out in DiGuilio. *E.g.*, Green v. State, 688 So. 2d 301 (Fla. 1996); Chadwick v. State, 680 So. 2d 567 (Fla. 1st DCA 1996); Livingston v. State, 682 So. 2d 591 (Fla. 2d DCA 1996); Jean-Mary v. State, 678 So. 2d 928 (Fla. 3d DCA 1996); Smith v. State, 681 So. 2d 894 (Fla. 4th DCA 1996); Johnson v. State, 682 So. 2d 215 (Fla. 5th DCA 1996).

In addition, Mr. Jones urges that, to the extent that the statute established procedures for the courts to conduct their review on appeal and creates standards of review for the appellate courts, the statute unconstitutionally violates the separation of powers. Article II, Section 3, Florida Constitution. Article V, Section 2(a) of the Florida Constitution confers on the Supreme Court alone the power to adopt rules for the practice and procedures in all courts. State v. Ford, 626 So. 2d 1338, 1245 (Fla. 1993)("All courts in Florida possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to the existing laws and constitutional provisions."). Establishing the appropriate standard of review on appeal is inherent in this Court's rule-making authority. State v. DiGuilio; Ciccarelli v. State, 531 So. 2d 129, 131 (Fla. 1988)(Grimes, J.,

specially concurring). According use of Section 924.051(7) to establish or modify the procedure for conducting appellate review is unconstitutional. Markert v. Johnson, 367 So. 2d 1003 (Fla. 1978).

Finally, while the statute places a burden on the victim of the error, it does not delineate what that burden is. To the extent that the statute is vague in defining the burden, the statute must be construed in favor of the defendant. Nell v. State, 277 So. 2d 1 (Fla. 1973)(if there is any doubt as to a statute, the doubt must be resolved in favor of the citizen). State v. DiGuilio requires that unless there is no reasonable doubt that the error did not influence the jury, the error cannot be considered harmless. Thus, if a burden is placed on the defendant as the victim of the error, consistent with DiGuilio, the burden would be that if the defendant raises a reasonable doubt that the error may have influence the jury, the error cannot be deemed harmless. This is also consistent with Heuss v. State, 687 So. 2d 823 (Fla. 1996), which explained that the party's initial burden is merely one of presenting a prima facie case, and the ultimate burden was on the reviewing court to "conclude beyond a reasonable doubt...that the verdict could not have been affected by the error."

Furthermore, even assuming that Section 924.051(7) is valid with respect to issues involving a technical violation of some

State procedural rule, a state may not apply its own harmless error procedure to resolve an issue involving a federal question. Chapman v. California, supra; White v. State, 356 So. 2d 56 (Fla. 4th DCA 1978). Where there is a violation of a right rooted in the Bill of Rights, the state's harmless error procedure gives way to the harmless error test in Chapman. Indeed, this Court has adopted the Chapman harmless error procedure in deciding issues involving the Florida Constitution and state law errors as well. *E.g.*, Traylor v. State, 596 So. 2d 957 (Fla. 1992); State v. Schopp, 636 So. 2d 1016 (Fla. 1995). The issue in the present case, far from involving some merely procedural error, raises an issue involving the admission of irrelevant and prejudicial testimony which implicates Mr. Jones' constitutional right to a fair trial. Indeed, the admission of evidence which tend to show a defendant's bad character and propensity to commit crime has been held presumptively harmful because of the danger that the jury will take it as evidence of guilt of the crime charged. Straight v. State, 397 So. 2d 903 (Fla. 1981).

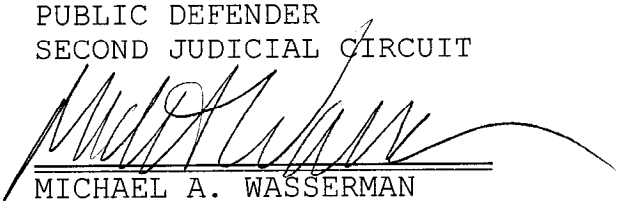
Consequently, the district court's summary conclusion "that appellant has not demonstrated that his trial contained prejudicial error, as required by section 924.051(7). Florida Statutes," is unconvincing. Mr. Jones' judgement of conviction should be reversed and this cause remanded for a new trial.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Mr. Jones requests that this Court quash the decision of the First District Court of Appeal, apply the harmless error test enunciated in DiGuilio v. State, and reverse the judgement and sentence below, with directions that Mr. Jones be afforded a new trial.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



MICHAEL A. WASSERMAN
ASSISTANT PUBLIC DEFENDER
FLA. BAR #0003077
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Denise O. Simpson, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to appellant, Mr. Herbert Jones, DOC# J02977, Hardee Correctional Institution, 6901 State Road 62, Bowling Green, FL 33834, on this 5th day of ~~September~~ October 1998.

MICHAEL A. WASSERMAN

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,805

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APPENDIX

MICHAEL A. WASSERMAN
ASSISTANT PUBLIC DEFENDER
FLA. BAR NO. 0003077

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

HERBERT JONES,

Appellant,

v.

CASE NO. 97-909

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed August 19, 1998.

An appeal from the Circuit Court for Duval County.
L. Haldane Taylor, Judge.

Nancy A. Daniels, Public Defender; Michael A. Wasserman, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Denise O. Simpson, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Upon a thorough review of the record, we conclude that appellant has not demonstrated that his trial contained prejudicial error, as required by section 924.051(7), Florida Statutes. Goodwin v. State, 23 Fla. L. Weekly D 918 (Fla.4th DCA April 8, 1998) on rehearing denied D1538 (Fla. 4th DCA June 24, 1998). Accordingly, we affirm and certify to the Supreme Court of Florida the identical question as was certified by our sister court:

IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.051(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN *DIGUILIO V. STATE*, 491 So.2d 1129 (Fla.1986)?

Goodwin, 23 Fla. L. Weekly D1538 (June 24, 1998).

MINER, ALLEN and KAHN, JJ., CONCUR.