ORIGINAL

IN THE SUPREME COURT OF FLORIDA

HERBERT JONES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,805

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent State of Florida will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner HERBERT JONES will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of five volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

This brief was prepared using 12 point New Courier.

STATEMENT OF THE CASE AND FACTS

The State has restated the issue and the question to show the critical fact that the trial itself took place well after 1 July 1996, the effective date of the Criminal Appeal Reform Act of 1996.

The parties previously submitted initial and answer briefs addressing the question of whether sections 924.051(7) and 924.33, which burden the appellant with showing properly preserved prejudicial error, were applicable to the instant case. This Court thereafter directed that supplemental briefs be

submitted on the narrow question of whether section 924.051(7) of the Criminal Appeal Reform Act applies retroactively to appellate review of convictions for crimes committed before the effective date of the Act. Petitioner has submitted a supplemental brief addressing that question and the state now answers. The case has also been scheduled for oral argument on 11 May 1999 along with a companion case, Goodwin v. State, case no. 93,491, where the state and Goodwin have submitted similar briefs on the same basic questions addressed here.

Petitioner's supplemental brief does not contain a statement of the case and facts. The state notes the following chronological events which are relevant to the retroactivity question raised by this Court.

The criminal acts for which petitioner was charged took place on 22 May 1996. I8.

The trial on these charges at which convictions were obtained did not take place until the following 4-5 February 1997. II-V

The Criminal Appeal Reform Act of 1996 became effective on 1 July 1996. Ch. 96-248, §9, Laws of Florida.

This Court's criminal and appellate rules implementing the Reform Act became effective 1 January 1997. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996); Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996).

SUMMARY OF ARGUMENT

There is no retroactivity issue here because the Criminal Appeal Reform Act of 1996 became effective 1 July 1996, more than six months prior to the time of trial. The revised rules of criminal and appellate procedure implementing the Reform Act also became effective 1 January 1997, more than a month prior to the trial. Petitioner was thus on notice prior to the start of the trial of any substantive or procedural changes in appellate review which might potentially impact on any appeal he might take if he was convicted and if there were any errors which might be arguably harmless. There is no right to an appeal until a final judgment is entered following a trial and conviction. The right to an appeal does not arise at the time of the crime. There has been no retroactive application of a change in law which denies a previously existing right to petitioner.

In actual fact, the state will show that there were no changes in substantive or procedural law concerning the burden of an appellant to show prejudicial error.

Section 924.051(7), which is at issue and in effect at the time of trial, provides:

> (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. Id.

Section 924.33 which has been in effect in one form or another since 1911 provides:

924.33 When judgment not to be reversed or modified. - No judgment 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. Id.

Both sections reach the same end - the appellant must show that error occurred and that the error was prejudicial, there can be no presumption that error is prejudicial or injurious. Both sections only apply to non-constitutional error, as here. They cannot apply to constitutional error, such as that identified in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)and State v. DiGuilio, 491 So.2d 1129 (1986): Comments on constitutional right to silence are subject to harmless error analysis **but** burden is on state to show harmlessness.

Further, section 924.051(7), and section 924.33, are simply restatements or reaffirmations of well-settled statutory and case law which have existed since at least 1911.

ARGUMENT

ISSUE

WHETHER THE REQUIREMENT OF SECTIONS 924.051(7) AND 924.33 THAT APPELLANTS HAVE THE BURDEN OF SHOWING PROPERLY PRESERVED PREJUDICIAL ERROR APPLIES TO APPELLATE REVIEW OF TRIALS CONDUCTED AFTER THE EFFECTIVE DATE OF THE CRIMINAL APPEAL REFORM ACT, 1 JULY 1996, AND THIS COURT'S IMPLEMENTATION OF THE ACT, 1 JANUARY 1997, WHEN THE OFFENSES ON WHICH THE TRIAL WAS CONDUCTED WERE COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE REFORM ACT? (RESTATED) . . .

The trial of these offenses took place on 4-5 February 1997. That date is well after the effective date of the Criminal Appeal Reform Act of 1996, 1 July 1996. It is also after the date, 1 January 1997, on which this Court's revised rules of criminal and appellate procedure procedurally implementing the Reform Act became effective. Thus, at the time of trial, and well before the time of trial, petitioner was on notice of the current substantive and procedural law which would control any appeal that he might take from any judgments entered as a result of his criminal trial.

Section 924.051(7) places the burden on the appellant or petitioner to show that a prejudicial error occurred at trial. The section reads as follows:

> (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. Id.

This statement of the burden of an appellant or petitioner does not differ in any significant, substantive manner from the provisions of section 924.33 which predate the Reform Act and have been in effect in their present form since at least 1939:

> **924.33 When judgment not to be reversed or modified.** - No judgment 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. Id.

The clear meaning of the last sentence of section 924.33 is relevant here - there shall be no presumption that error is prejudicial. If error cannot be presumed to be prejudicial then obviously the appellant is required to overcome that presumption by showing that prejudicial error occurred. Well settled case law of this Court, predating the Reform Act by almost a century, uniformly holds that it is the responsibility of the appellant to overcome the presumption of correctness afforded trial court judgments and to make reversible or prejudicial error clearly apparent on the record.

This Court's decision in O'Steen v. State, 111 So. 725, 728-730 (Fla. 1926) which quotes and discusses at length section 2812 of the Revised General Statutes (1911), a predecessor statute to sections 924.33 and 924.051(7), is both instructive and controlling. This 1926 decision is worth quoting at length because it contains in large part the substance of the Criminal Appeal Reform Act of 1996 enacted some seventy years later:

These cases were, however, all decided ***729** long prior to the enactment, in 1911, or what is known as the 'harmless error statute,' now appearing as section 2812 of the Rev. Gen. Stats. This statute provides that:

> 'No judgment shall be set aside or reversed, * * * in any cause, civil or criminal, * * * for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.'

[7] While not necessary to a decision of this cause, it would seem that a reasonable interpretation of this statute would be that the party complaining must make the error complained of to affirmatively appear to the appellate court by the record of the proceedings in the court below the judgment of which he is asking to have set aside and annulled. It has long been held in this jurisdiction that this court will not consider an assignment of [92 Fla. 1074] error unless the action of the court below alleged as error affirmatively appears of record. Bryant v. State, 34 Fla. 291, 16 So. 177; McNealy v. State, 17 Fla. 198.

[8] Although there are exceptions, such as that pointed out in the Lovett Case, the general rule has long been to the following effect:

> '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, order, or decree from which the appeal was taken. In other words, it will be presumed on appeal, in the absence of a contrary showing, that the trial court acted correctly and did not err. Indeed error is never presumed on appeal, but must be affirmatively shown by the record; and the burden of so showing it is on the party alleging it, or, as sometimes stated, the burden of showing error affirmatively is upon appellant or plaintiff in error.' 4 C. J. p. 731, s 2662.

Again, on page 736 of the same work, it is said that the appellate court----

> 'will not, for the purpose of finding a reversible error, presume the existence of facts as to which the record is silent. Thus, in support of the ruling or decision complained of, it will be presumed on appeal, as to matters not fully disclosed by the record, that public officials perform their duty; that statutory requirements were complied with,' etc.

Numerous decisions are cited in support of these propositions. See, also, 2 Encyc. Pldg. & Prac. 499 et seq.

This general principle has been frequently upheld by this court in both civil and criminal cases. Thus, in the case of Baker and Holmes Co. v. Indian River State Bank, 61 Fla. 106, 55 So. 836, it was held:

> 'Upon a writ of error, the respective parties litigant are presumed to have had their day in court and to have had the points at issue between them fairly and impartially tried and determined in accordance with the law of the land. **The final judgment rendered in the trial [92 Fla. 1075] court is presumed to be correct, and this presumption must be met in the appellate court and overcome by the plaintiff in error in order to obtain a reversal of such judgment.**'

As a corollary to this rule, there is another rule almost universal in application to the effect that questions not raised and properly presented for review in the trial court will not be noticed on appeal and a fortiori, where counsel declares on a trial in open court that only a certain question is involved in a case, or where by stipulation a case is submitted only on a certain question, other questions cannot be raised in the appellate court. See, in support of these propositions, numerous cases cited in 3 C. J. p. 689, et seq.

. . . .

The counsel of an appellant party is charged with the duty of bringing to the appellate court a transcript of the record of the inferior court; and, since the enactment of the statute now appearing as section 2812 of the Rev. Gen. Stats., it would seem to be the duty of such appellant to make it appear from such record that the error, for the commission of which he asks that the verdict and judgment of the lower court be reversed and set aside, was actually committed by the court; and he should show that not only, but by a long line of the decisions of this court it must also appear that such ***729 error, when shown, must be shown to be of *730 such a character as to have been prejudicial and injurious in its tendency or effect upon the rights of the defendant.** See Hooker v. Johnson, 10 Fla. 198; 4 C. J. 910 et seq.; Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922. This jurisdiction appears to have followed what is known as the 'orthodox English rule,' rather than the rule announced by the Court of Exchequer in 1830, the latter being that 'an error of ruling creates per se for the excepting and defeated party a right to a new trial.' This Exchequer rule that injury would always be presumed from error committed led to such absurd consequences that it was subsequently abolished in England by the Judicature Act of 1875, and the original rule restored, though not before such unwise rule had been adopted by many of the courts in this country, with disastrous effects. See an interesting discussion of this question in 1 Wigmore on Evidence, s 21, and an able article by Justice William H. Thomas of the

Supreme Court of Alabama, contained in the proceedings of the Alabama State Bar Association for 1907.

Id.

The above O'Steen decision shows that there is nothing new in the 924.051(7) requirement that the burden is on the appellant to show that properly preserved, prejudicial error was committed by the trial court. It can be fairly said, and the state says it, that the Criminal Appeal Reform Act of 1996 is largely a codification and reiteration of this Court's decision and analysis in O'Steen and innumerable other similar cases.

The state invites the attention of the Court to the relevance of the above to the companion case of Goodwin v. State, case no. 93,491. Sections 924.051(7) and 924.33 both have pedigrees reaching back long before any of the crimes, trials, or appeals occurred in either Goodwin or Jones or any other case now pending in any appellate court in the state of Florida. Neither Goodwin nor Jones have any basis for asserting surprise that as appellants or petitioners they have the burden to show prejudicial error when the error at issue is non-constitutional, as it is here.

The state relies on its earlier answer brief arguing that sections 924.051(7) and 924.33, when applied to non-constitutional error, are constitutionally compatible with State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), which itself upheld the constitutionality of section 924.33. In this respect, see, also, this Court's recent decision in White v. State, 24 Fla. L. Weekly

S131 (Fla. 11 March 1999) where it applied the harmless error standard of Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946) to non-constitutional error, not the higher standard of Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967) and DiGuilio to constitutional error.

There are two additional points which the state wishes to bring to the attention of the Court. The first is that the question of whether the Reform Act is to be applied will inevitably recur even if it is temporarily deferred by declaring that the time of the crime is the controlling factor in determining what law will be applied to appeals. As the times of new offenses moves forward, as they will, the Reform Act will be applicable and the question presented here must be addressed. Presumably, if the district courts here are told that application was premature, they will simply await maturity and apply the Reform Act as they have here. The state has no interest in the improper **ex post facto** application of the Reform Act, it maintains that there is nothing in the Act which is being retroactively applied to events occurring before its effective date, 1 July 1996.

The second additional point is that the law heretofore has been that appellate courts apply the law in effect at the time of appeal from the proceeding below to a current appeal. Whittaker v. Eddy, 147 So. 868 (Fla. 1933). The right to an appeal does not arise until a final judgment has been entered and on that basis the district court below did not err in applying the Reform Act

to the appeal because it was in effect prior to the trial and impacted only on the appeal, not on the trial of the crime. If, however, the time of the crime is controlling, changes in rules which disadvantage the appellant would also be subject to challenge. For example, using the time frames here, the revised Rules of Appellate Procedure which became effective 1 January 1997, before the trial but after the crime, would also be subject to challenge. As the state pointed out above, a major element in those revised rules was the implementation of the Reform Act by a number of criminal and appellate rule changes. See, e.g., rules 9.140b(2) and 9.140(d).

Based on the above, the state maintains that it is constitutionally permissible, and statutorily mandated, to (1) afford **all** trial court judgments a presumption of correctness and (2) require any appellant to show that prejudicial error was committed by the trial court and that such prejudicial error was properly preserved in the trial court. These two overlapping and mutually supporting propositions are constitutionally permissible and statutorily mandated. The sole exception to proposition two is when the error complained of violates a specific constitutional right, such as the right to remain silent. When a Chapman and DiGuilio error occurs, the burden is shifted to the state to show that the constitutional error was not in fact prejudicial. With that exception, the burden is always on the plaintiff to show that any error was prejudicial. Thus, there is no constitutional impediment to applying the requirement in

section 924.051(7) and 924.33 that the appellant must show prejudicial error to the instant and future cases.

CONCLUSION

The application of sections 924.051(7) and 924.33 to harmless error analysis of non-constitutional error in the instant case is not retroactive, does not violate the **ex post facto** clause, and is compatible with Chapman and DiGuilio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Paula S. Saunders, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 26th day of March, 1999.

James W. Rogers
Attorney for the State of Florida

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