IN THE SUPREME COURT OF FLORIDA

HERBERT JONES,

Petitioner,

v. Case No. 93,~~085~~ 805

STATE OF FLORIDA,

Respondent.
_____/

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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I. PRELIMINARY STATEMENT

This brief is submitted in reply to Respondent's Supplemental Answer Brief. Respondent's brief will be referred to herein as "AB." This brief is printed in 12 point Courier New, a font that is not proportionately spaced.

II. ARGUMENT

ISSUE PRESENTED

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.

In its Supplemental Answer Brief, Respondent argues that there is no retroactive application of the Criminal Appeal Reform Act because the Act became effective more than six months prior to Jones' trial and Jones was thus on notice prior to trial of any substantive or procedural changes in the statute. Alternatively, Respondent asserts that there have been no changes in substantive or procedural law concerning the burden of establishing prejudice and hence there is no retroactivity issue. These arguments ignore the precedent of this Court and the impact of the Section 924.051(7), Fla. Stat.

The State takes the position that since the right to an appeal does not arise until a final judgment has been entered and the Criminal Appeal Reform Act impacts only the appeal, there is no impediment to applying the Act when it became effective prior to the date of trial. This assertion begs the issue and blurs the distinction between the effective dates of the rules of procedure and statutory law. A substantive change in the law cannot be applied to cases in which the crimes were committed before the law's effective date, regardless of the date of the trial or appeal. The operative date is the date of the offense, not the

date of the trial.

It is well settled that decisional law and rules in effect at the time an appeal is decided govern a case even if there has been a change the since time of trial. Lowe v. Price, 437 So.2d 142 (Fla. 1983); Wheeler v. State, 344 So.2d 244 (Fla.1977). Because the appellate rules are procedural in nature and not intended to create any substantive legal rights, there is no impediment to applying such rules retroactively. Statutes, on the other hand, are presumed to operate prospectively, in the absence of a clear legislative intent to the contrary. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983).[1] This rule applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights. Id. The fact that this Court revised both the Rules of Criminal Procedure and the Rules of Appellate Procedure to implement certain provisions of the Act is on no consequence. First, the rules are procedural and by nature cannot alter substantive rights. Further, while the appellate rules should be compatible with other laws, this does not mean that both the rules and statute must or should be implemented simultaneously. In fact, the Act went into effect July 1, 1996, and the rule changes became effective January 1, 1997. Amendments to Florida Rules of Appellate Procedure, 685 So.2d 773 (1996). Moreover,

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[1]"Prospective law" is defined as "[o]ne applicable only to cases which shall arise after its enactment." Black's Law Dictionary (6th ed. 1990).

neither the criminal rules nor the appellate rules address the harmless error standard and respective burdens of proof.

Contrary to the state's assertion that it is 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 (AB 11), both the presumption of correctness and harmless error standard are principles of appellate procedure. See, e.g., Applegate v. Barnett Bank, 377 So.2d 1150 (Fla. 1979)(the judgment of the lower court is presumed to be correct and the burden is on the appellant to demonstrate error); White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984)(although evidence improperly admitted, it was harmless error and not grounds for new trial). Although the harmless error rule has been codified in Sections 59.041, Fla. Stat., and Section 924.33, Fla. Stat., the concept of harmless error originated in the case law to guide appellate courts in their review function.

In his seminal book on appellate procedure, Judge Padovano writes:

> The harmless error rule is designed to encourage a realistic approach to appellate review by allowing the appellate courts to consider not only the existence of error at the trial level, but the *effect* of the error. Few, if any, criminal trials are totally error free. The point of an appeal, however, is to provide a remedy for the correction of errors that might have effected the outcome of the case. An appellate court is not a forum for

> the analysis of abstract legal issues generated by inconsequential rulings.
>
> In the leading of *State v. DiGuilio*, the Florida Supreme Court defined the harmless error standard in criminal prosecutions. The court said that '[t]he harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.'
>
> As the court explained in *DiGuilio*, application of the rule 'requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.' The party who is the beneficiary of the error has the burden of demonstrating beyond a reasonable doubt that the error was harmless in the sense that it did not cause or contribute to the order under review.

Philip J. Padovano, Florida Appellate Practice §25.4 (2d ed. 1997)[Footnotes omitted].

Thus, although the harmless error statute, Section 924.33, Fla. Stat., requires a finding of prejudice before a judgment can be reversed or modified, the method of review to determine the effect of an error is a procedural matter within the court's domain. In Amendments to Florida Rules of Appellate Procedure, supra, this Court recognized that the legislature can place reasonable conditions on an appellant's right to appeal so long as it does not

impede an appellant's legitimate right to appeal. The method of review, however, is not a condition on the right to appeal but rather a procedural matter within the exclusive province of the Supreme Court.

Section 924.33, Fla. Stat., does not require the appellant to show that error occurred and that the error was prejudicial; it addresses only the role of the court, not that of the litigants. It precludes an appellate court from reversing the judgment of the lower tribunal unless, after an examination of the appellate record, the court concludes that error was committed that injuriously affected the substantial rights of the appellant. The statute does not allocate either the burden of going forward or the burden of proof. The respective burdens were established by case law which provide that the appellant has the initial burden of going forward by showing that an error was committed, and once that burden is met, the burden of proving that the error is harmless shifts to the beneficiary of the error. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). DiGuilio and subsequent cases did not distinguish between constitutional and non-constitutional errors but allocated the respective burdens in a logical and "realistic" fashion, notwithstanding the language of Section 924.33, Fla. Stat., that prejudice "shall not be presumed." Once the injured party establishes that error was committed, it stands to reason that the advantaged party prove that its error did not harm its opponent.

Admittedly, not all error is reversible. There are some errors which will always be prejudicial, e.g., the denial of the right to counsel, and other errors which will rarely, if ever, be deemed harmful, e.g., asking leading questions of a witness. Some errors, such as the introduction of collateral crime evidence and discovery violations, are presumed harmful. See, e.g., State v. Schopp, 653 So.2d 1016, 1021 (Fla. 1995)(procedural prejudice inherent in discovery violations). Most errors, however, are not presumed harmful but may be prejudicial depending on the facts and circumstances of the individual case. The standard for harmless error remains the same in all of these cases whether the error is of a constitutional nature, an evidentiary violation, or a procedural transgression. The burden of going forward and burden of proving that the error was harmless should also be the same. State v. Schopp (state has the burden to establish that discovery violation is harmless; if the record is insufficient for the appellate court to determine that the defense was not prejudiced by the discovery violation, the State has not met its burden and the error must be considered harmful). Although the remedy may depend on the degree of harm or prejudice, the standard of review and respective burdens should not depend on the circumstances or characterization of the error.

Section 924.051(7), however, shifts the burden of proving prejudice to the complaining party. Relying on O'Steen v. State, 111 So.2d 725 (Fla. 1926), the State contends that there have been

no changes in substantive or procedural law concerning the burden of showing prejudicial error. The law has undoubtedly evolved since O'Steen was decided in 1926, and the standard set forth in DiGuilio was the controlling precedent at the time Section 924.051(7) was enacted. While the Criminal Appeal Reform Act may have reverted to the procedures in O'Steen, it clearly represents a departure from DiGuilio and its progeny. Respondent cannot avoid the retroactivity issue by insisting that Section 924.051(7) is simply a reaffirmation of prior law.

The reallocation of the burden of proof is a significant change in the law, whether it is deemed procedural or substantive. Petitioner submits that the allocation of the burden of proving harmful or harmless error is procedural in nature but nonetheless effects substantive rights, and therefore the statute cannot be applied retroactively to crimes committed before its effective date. It is the date of the offense, not the date of the trial or the date of the appeal that controls.

III. CONCLUSION

Section 924.051(7) represents a significant change in the law set forth in State v. DiGuilio and should not be applied retroactively to cases arising prior to prior to its enactment. Based upon the foregoing argument, reasoning and citation of authority, as well as that in Petitioner's Supplemental Brief, Petitioner requests that this Court remand the instant cause to the district court to reconsider the issue on appeal in light of the harmless error standard in DiGuilio.

Respectfully submitted,

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