SUPREME COURT OF FLORIDA

CASE NO. 96,554

JEAN HARRT CAZEAU,

Petitioner,

- vs -

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER ON THE MERITS

David M. Tarlow, Esq.
SPENCER & KLEIN, P.A.
801 Brickell Avenue, Suite 1901
Miami, Florida 33131
(305) 374-7700

Attorneys for Petitioner
Jean Harrt Cazeau

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

INTRODUCTION

This is the Initial Brief on the merits of Petitioner/Defendant Jean Harrt Cazeau on conflict jurisdiction from the Third District Court of Appeal.

Citations to the Record are abbreviated as follows:

(R.) - Clerk's Record on Appeal;

(TR.) - Transcript of proceedings;

(A.) - Appendix with Third District's decision.

STATEMENT OF THE CASE

On September 25, 1996, Petitioner/Defendant was charged with one (1) count of burglary of an unoccupied dwelling. (R. 1-3). On October 1, 1996, Respondent/Plaintiff filed a Notice of Intention to Seek an Enhanced Penalty Pursuant to Florida Statutes section §775.084. (R.10). On October 14, 1998, a jury trial commenced on the Information. (R. 12). On October 15, 1998, the jury returned a guilty verdict on the Information. (R. 13-14). On December 7, 1998, Petitioner/Defendant was sentenced to a term of thirty (30) years minimum mandatory as a violent career criminal. (R.85-87). On December 24, 1998, a timely notice of appeal was filed in the Third District Court of Appeal. (R. 91). On September 1, 1999, the Third District Court of Appeal affirmed

Petitioner/Defendant's conviction but certified direct conflict with the Second District Court of Appeal on the violent career criminal sentencing issue. (A. 1-2).

STATEMENT OF THE FACTS

The factual evidence in the light most favorable to the Respondent/Plaintiff established that on September 5, 1996, Detective Juan Gross of the Metro Dade Police Department was dispatched to a 26 [burglary in progress] at 17530 N.W. 29th Court ("Dwelling"). (R.170-171). As the detective approached the Dwelling, he observed Petitioner/Defendant walking out the front door. (R. 171 - 172). Petitioner/Defendant was detained and detective Gross conducted a search of the Dwelling wherein he observed jewelry and property next to the front door and a bedroom that was "ransacked". (R. at 172-173).

Detective Gross stated on cross-examination that at the time he observed Petitioner/Defendant exiting the Dwelling, Petitioner/Defendant was not wearing gloves, did not run, did not have any type of burglary tool(s), or any of the victims property on his person. (R. 179-181).

The owner of the Dwelling, Mattie Wilkerson, testified that she is the owner of the Dwelling, she never gave permission or consent to the Petitioner/Defendant to go inside the Dwelling, that at the time she left the Dwelling, she did not leave her jewelry and property by the front door. (R. 186-191).

Petitioner/Defendant's defense at trial, argued exclusively through reasonable doubt, was that Petitioner/Defendant committed a trespass and not a burglary as there was no direct proof that Petitioner/Defendant was responsible for the ransacking of the Dwelling and/or the moving of the jewelry and personal property. (R.210-215).

SUMMARY OF ARGUMENT

During the commencement of voir dire, the trial court recited the standard instruction of reasonable doubt to the *venire*. After reciting the instruction, the court, *sua sponte*, sought to offer its personal opinion of what does not constitute reasonable doubt. The court's offer was made to the *venire* by way of a hypothetical example involving circumstantial evidence. The court's improper hypothetical example and personal opinion as to what evidence does not rise to the level of reasonable doubt, coupled with extra judicial

comments as to whether the *venire* would require Respondent/Plaintiff to "prove [their] case beyond and to the exclusion of all doubt or beyond a shadow of a doubt" so minimized the standard of doubt instruction that the court inferred that the *venire* could return a finding of guilty based on a mere probability of guilt. The court's improper hypothetical and subsequent extemporaneous comments violated Petitioner/Defendant's right to due process and constitutes reversible error.

The Officer Evelyn Gort and All Fallen Officers Career Criminal Act of Florida Statutes §775.084(4)(c) (hereafter referred to as the "Gort Act") are unconstitutional because the session law that created it, Chapter 95-182, Laws of Florida, violates the single subject provisions of the Florida Constitution. The Gort Act addresses two distinct subjects: career criminal sentencing and civil remedies for victims of domestic violence. Since these two subjects are not reasonably related, Chapter 95-182, Laws of Florida, addresses more than one subject, it is therefore unconstitutional.

Consequently, defendants whose offenses were committed between the date the Gort Act took effect, October 1, 1995, and May 24, 1997, the date the Florida Legislature re-enacted the Gort Act, are entitled to relief from such violent career criminal sentencing. Since the Petitioner/Defendant in the case

sub judice committed the crime on September 5, 1996, during the "window period", Petitioner/Defendant should be re-sentenced within the sentencing guidelines should this Court determine that the lower court's hypothetical example and extemporaneous comments do not constitute reversable error warranting a new trial.

The constitutionality of the Gort Act is presently pending in this Court in State v. Thompson, Case No.: 92, 831, and the Petitioner/Defendant adopts the defense brief filed in this Court in *Thompson* for his Initial Brief in this case.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT MADE EXTEMPORANEOUS COMMENTS, OVER OBJECTION, WHICH MINIMIZED THE REASONABLE DOUBT STANDARD IN VIOLATION OF DEFENDANT/PETITIONERS RIGHT TO DUE PROCESS.

During the commencement of *voir dire,* the lower court recited the standard instruction of reasonable doubt to the *venire*. As cited at R. 17-18, the lower court, after reading the standard reasonable doubt instruction, *sua sponte*, commented as follows:

> Court: Let me give you an example that I like to give as far as reasonable doubt. Suppose you came this morning, you finally found a parking space somewhere across the street, and when you got out of the car, the parking lot

was dry. The expressway was dry. You come into the building and sit in here with your beautiful view of downtown no where. You then leave the building. You walk outside. The roadway is wet. The stairs are wet. The parking lot where your car is parked is wet. Your car is wet. What do you think happened? It rained right?

It is possible that a fire truck came along with a fire hose and just wet everywhere that you happened to have be walking? It 's possible. Would that be a forced doubt, or would it be a speculative doubt? I mean, it's a possibility, but it really is a reach to think that happened.

So that's an analogy that I like to give for a reasonable doubt.

Can everybody follow the law as I just explained it to you? Is there anybody that would hold the State to a higher burden and say that, "Gee, State, you must prove your case beyond and to the exclusion of all doubt or beyond a shadow of a doubt"?

Defense: Judge, can I have a side-bar?

Defense: I object to the analogy you gave. I object to instructing the jury of what reasonable doubt means. I think the court should read the jury instruction and nothing more. The reason I object is because your example, you are explaining the reasonable doubt to them, [de]minimizing the importance of the reasonable doubt standard, so I object.

Court: [O]bjection is overruled.

The purpose of conducting *voir dire* is to secure an impartial jury. Davis v. State, 461 So.2d 67 (Fla. 1984); Lewis v. State, 377 So.2d 640 (Fla. 1979). The scope of *voir dire* rests in the trial court's discretion, and a district court of appeal will not reverse unless the trial court has clearly abused its discretion. Sisto v. Aetna Cas. and Sur. Co., 689 So.2d 438 (4th DCA 1997).

In State v. Wilson, 686 So.2d 569 (Fla. 1996), this Court, recognizing why trial judges might wish to acquaint the jury with the concept of reasonable doubt at an early stage of the proceeding, strongly suggested that this be done only by reading in advance the approved standard jury instruction on the subject. This Court went on to state that any extemporaneous explanation of sensitive legal issues that are already embraced within the standard jury instructions run the risk of creating error. Id. at 570. In Wilson, prior to selecting the jury, the trial court spoke to the entire *venire* about "the three cardinal rules". Id. at 570. In explaining the third cardinal rule, the trial court read the standard instruction on the standard of proof in a criminal case. Id. At 570. After reading the standard of proof instruction, the trial court stated as follows:

> In order to secure a conviction, that is, it has to convince a jury beyond and to the exclusion of every reasonable doubt of the defendant's guilt. But even though it's a heavy burden, the State does, I repeat, stress, and emphasize, the State does not have to convince you to an absolute certainty of the defendant's guilt. Nothing is one hundred percent certain, nothing is absolutely certain in life other than

> death and taxes. So the point I'm trying to make is you can still find him guilty so long as it's not a reasonable doubt. A reasonable doubt is a doubt you can attach a reason to.
>
> If at the conclusion of this trial you have a doubt as to the defendant's guilt that you can attach a reason to you must find the defendant not guilty. But if on the other hand at the conclusion of the trial the only kind of doubt you have as to the defendant is a possible doubt, a speculative doubt, an imaginary doubt, a forced doubt, that's not a reasonable doubt. If all the elements of the crime have been proved to you, you must find the defendant guilty.

Id. at 570. This Court was asked to decide whether this extemporaneous comment constituted fundamental error[1] and whether this comment, standing alone, was violative of the protections of the due process clause. This Court answered both questions in the negative finding that even if the above statement could be said to be error, the error was not fundamental, that is, error which reached down into the validity of the trial itself to the extent that a verdict of guilty could not have been legally obtained. Id. at 570. However, the Court strongly suggested that any extemporaneous explanation of sensitive legal issues that are already embraced within the standard jury instructions run the risk of creating error. Id. at 570.

In the case *sub judice*, aside from the trial court making extemporaneous comments as to the reasonable doubt instruction, propounded a hypothetical in

[1] The complained of error in this case was timely objected to and is thus not subject to the fundamental error analysis.

which the lower court expressed his personal opinion[2] in determining what evidence does not meet the reasonable doubt standard. The trial court's improper hypothetical and supplementary extemporaneous comments as to whether the *venire* would require Respondent/Plaintiff to "prove [their] case beyond and to the exclusion of all doubt or beyond a shadow of a doubt" so minimized the standard reasonable doubt instruction that the court inferred that the venire could return a finding of guilty based solely on a probability of guilt so long as it was a strong probability[3]. Simply stated, the error of the trial court is that the trial court invaded the providence of the jury by interpreting what evidence rises to the level of reasonable doubt. The case *sub judice* was a circumstantial evidence case[4]. The trial court, by providing the *venire* with a hypothetical example involving circumstantial evidence, instructed the venire that they could return a verdict of guilty based on a probability of guilt and not based solely on the reasonable doubt instruction.

---

[2] Although this was the trial court's opinion, one can logically assume that the *venire* considered it law.

[3] As the Transcript reflects at page 207, the trial court gave a defense requested instruction on circumstantial evidence. Appellant submits that due to the trial courts' improper hypothetical and subsequent extemporaneous comments that in a circumstantial case, a defense theory could be a possibility, but not one that rises to the level of reasonable doubt left the jury with no choice but to find Petitioner/Defendant guilty in this case.

[4] As reflected at pages 207-208 of the Record, the trial court read to the jury a circumstantial evidence instruction.

The Third District Court of Appeal in Doctor v. State, 677 So.2d 1372 (Fla. 3d DCA 1996), held that the giving of extemporaneous instructions on reasonable doubt prior to the commencement of *voir dire*, which instructions allegedly minimize the reasonable doubt standard, did not rise to the level of fundamental error. During Doctor's trial, prior to the commencement of voir dire, the trial court gave extemporaneous instructions on reasonable doubt to the jury venire. Id. at 1373. Defense counsel did not object. Id. Doctor argued on appeal that the extemporaneous instruction minimized the reasonable doubt standard instruction and his conviction required reversal. Id.

The Third District, adhering to its decision in Freeman v. State, 576 So.2d 415 (Fla. 3d DCA 1991), affirmed the conviction holding that the giving of the instruction does not otherwise rise to the level of fundamental error.

As stated above, the standard of proof in the case *sub judice* is that of an abuse of discretion rather than that of fundamental error as addressed in Freeman and Doctor. Petitioner/Defendant timely made a contemporaneous objection to the improper hypothetical and extemporaneous comments and submits that the cases of Doctor and Freeman are not controlling.

II. THE GORT ACT VIOLENT CAREER CRIMINAL PROVISIONS OF FLORIDA STATUTES §775.087 (4)(c) ARE UNCONSTITUTIONAL BECAUSE THE SESSION LAW THAT CREATED IT, CHAPTER 95-187, LAWS OF FLORIDA (1995), VIOLATE THE SINGLE SINGLE SUBJECT PROVISIONS OF THE FLORIDA CONSTITUTION, AND CONSEQUENTLY, THE DECISION OF THE THIRD DISTRICT MUST BE QUASHED AND THE DEFENDANT'S THIRTY (30) YEAR SENTENCE PURSUANT TO THE GORT ACT REVERSED AND REMANDED FOR RE-SENTENCING.

As to this specific issue, this Court must determine if the Gort Act, creating the violent career criminal sentencing enhancement in §775.084 (4)(c), Florida Statutes (1995), is unconstitutional on the ground that the session law that enacted it, Chapter 95-182, at 1665, Laws of Florida, violate the single subject provision of the Florida State Constitution, so that the Petitioner/Defendant's sentence as a violent career criminal pursuant to that act is illegal.

This precise issue is presently pending before this Court in State v. Thompson, Case No.: 92, 831. In Thompson v. State, 708 So.2d 315 (Fla. 2d DCA 1998), the Second District Court of Appeal held that Chapter 95-182 was unconstitutional for violation of the single subject requirement of article III, section 6, of the Florida Constitution, and invalidated a violent career criminal disposition for crimes committed between the time the Gort Act was enacted,

October 1, 1995, to the legislative re-enactment of the Gort Act, May 24, 1997. As noted, the *Thompson* case is now pending before this Court on this very issue.

In the present case, the Petitioner/Defendant was charged with committing the offense on September 5, 1996, within the window period during which the Gort Act was declared unconstitutional in *Thompson*. In the case *sub judice*, the Petitioner/Defendant was found to be a violent career criminal and was sentenced to an enhanced sentence of a minimum mandatory term of imprisonment of thirty (30) years. (R.85-87).

In Linder v. State, 711 So.2d 1340 (Fla. 3d DCA 1998), the Third District acknowledged that a defendant would be entitled to sentencing relief, on this issue, if his case were proceeding in the Second District. The Third District also acknowledged in *Linder* that it had previously rejected the identical single subject challenge to Chapter 95-182 in Higgs v. State, 695 So.2d 872 (Fla. 3d DCA 1997). However, in view of the Second District's later contrary decision in *Thompson*, the Third District certified conflict to this Court both in Linder and in the present case on the issue of whether the violent career criminal sentencing statute, §775.084 (4)(c), Florida Statutes (1995), is unconstitutional in that it violates the single subject provision of the State Constitution.

The Petitioner/Defendant has reviewed the arguments made by the defense in the *Thompson* case and has determined that they are fully applicable to this case. In the interest of judicial economy, the defendant therefore fully adopts the arguments submitted in the defense's Answer Brief filed in this Court in *State v. Thompson* for the Petitioner's brief in this case.

In conclusion, Chapter 95-182, Laws of Florida, creating the Gort Act violates the single subject provision of the Florida Constitution. Since the crime occurred during the window period during which the Gort Act was unconstitutional, the Petitioner/Defendant's sentencing as a violent career criminal under the Gort Act was illegal and his enhanced violent career criminal sentence of a minimum mandatory forty year sentence must be reversed.

CONCLUSION

Based on the foregoing, the Petitioner/Defendant respectfully requests that this Honorable Court quash the decision of the Third District and reverse the Petitioner/Defendant's conviction and remand the case to the lower court for a new trial.

REQUEST FOR ORAL ARGUMENT

Petitioner/Defendant respectfully requests oral argument should this Honorable Court accept discretionary review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed, via U.S. mail, to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, FL 33131, this 18th day of October, 1999.

SPENCER & KLEIN, P.A.
Attorneys for Petitioner
801 Brickell Avenue
Suite 1901
Miami, Florida 33131
(305) 374-7700

By:_____
David M. Tarlow
Florida Bar No.: 893684