ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA,

RICHARD NAGEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC 96,900

****

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Respondent/Appellee hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the appellant in the Florida Fourth District Court of Appeal. Respondent was the respondent in the trial court and the appellee in the district court.

In this brief, the parties will be referred to as they appear before this Court, except that the Respondent may also be referred to as "State" or "Prosecution."

The following symbols will be used;

AB = Petitioner's Initial Brief

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts to the extent they present an accurate, objective and non-argumentative recital of the procedural history and facts of this case, and subject to the following additions, corrections or modifications:

1. Contrary to Petitioner's Statement of the Facts, Officer Crowell was not "reluctant" to admit Petitioner walked toward Officer Crowell's car. In fact, Officer Crowell stated quite clearly that after the stop, Petitioner got out of his car, stumbled, and proceeded to the rear of his own vehicle (T **81).** Officer Crowell's car was stopped ten to fifteen feet behind the Petitioner (T 124), and never got as far as the front fender of the officer's vehicle (T 123).

2. Petitioner had trouble getting out of his car (T 12 1- 122) and was unsteady on his feet, "swaying tremendously" (T 83).

3. Petitioner's eyes appeared to be bloodshot and glassy, and he smelled of alcohol. The odor of alcohol was between moderate and strong (T 82).

4. Petitioner could not perform a walk-and-turn test in which he was required to stand upright and walk heel-to-toe (T 83; 91); he needed the assistance of the car to stand upright (T 84).

5. He was not asked to perform the finger-to-nose test in which he would have

been required to close his eyes and touch his nose because his balance was exceptionally diminished, even with his eyes open (T 92).

6. The smell of alcohol stayed with Petitioner the entire time Officer Crowell was in contact with him (T 93).

7. Petitioner's voice sounded "very slurred" (T 93).

8. Prior to the stop, Petitioner swerved his car between lanes; his car was unable to "maintain a single lane of traffic" (T 76; 116).

9. Officer Crowell had been on the police force for approximately three years prior to Petitioner's arrest (T 68; R 1); he had seen more than twenty people who had been driving under the influence of alcohol (T 106).

10. Officer Tawil, who served as back-up, testified that Petitioner smelled of alcohol; that his speech was slurred, his eyes were bloodshot, and he had trouble standing (T 17; 44).

11. Officer Tawil also testified that Petitioner's feet seemed "heavy" as he walked (T 17).

12. Officer Tawil had made approximately thirty (30) arrests for DUT (T 18).

13. Jerry Forteza, is a Breathalyzer technician at the Palm Beach County Sheriffs Office, and had worked there for one and one-half years prior to Petitioner's arrest T 161; R 1).

14. Forteza testified that Petitioner's eyes were bloodshot; that he smelled of alcohol, and his dexterity was poor as he was "swaying and sluggish" (T 163).

15. Forteza further testified that he began observing Petitioner twenty to thirty minutes before the videotaping began, and during that time Petitioner's appearance and demeanor improved (T 165; 172).

16. During cross-examination of the Petitioner by the prosecutor, the following exchange took place:

> Q: (By the prosecutor): Isn't it true that you tried to get your friends from Riviera Beach Police Department to call Officer Crowell to get the charges dropped?
>
> A: No, ma'am. That's not correct.
>
> Q: You're saying that no Riviera Beach police officer ever called Officer Crowell to get the charges dropped?
>
> A: I have no idea.
>
> Q: You never asked – you never called your Riviera Beach Police friends about this case?
>
> A: No, they stop by the dock.
>
> Q: And what?
>
> A: Sit around, watch the boats come in, watch the fish,

B.S., they take their break there.

Q: And did they know that you had a DUI pending?

A: I mentioned that to them. Yes, I did.

Q: Did you tell them you were worried about it?

A: No.

(T 315-316)

17. The prosecutor was permitted to call Officer Crowell as a rebuttal witness. On rebuttal, the following exchange occurred:

Q: (By the prosecutor): You got a call from a Riviera Beach police officer?

A: (Officer Crowell): Yes, I have.

Q: And it was regarding this case.

A: Yes, ma'am.

Q: And was it regarding having the case dropped?

A: It was regarding information on the case and whether I could possibly cut someone a break or not.

MS. PATULLO (The prosecutor): No further questions.

(T 335).

18. All three state witnesses testified that in their opinions Petitioner was under the influence of alcohol (Tawil: T 46; Crowell: T 107; Forteza: T 163).

19. Petitioner was convicted of driving under the influence of alcohol following a jury trial; he appealed to the Florida Fourth District Court of Appeal, arguing that the admission of Officer Crowell's testimony on rebuttal amounted to reversible error.

20. The Fourth District Court of Appeal affirmed the conviction in a *per curium* affirmance, citing *Doherty v. State,* 726 So.2d 837,839 (Fla. 4th DCA 1999) and *Goodwin v. State,* 721 So.2d 728, 729 (Fla. 4th DCA 1998), *rev. granted, 729* So.2d 391 (Fla. 1999).

SUMMARY OF THE ARGUMENT

Given the standard set down by this Court in *Goodwin v. State,* 1999 WL **1186439** (Fla.), a thorough review of the evidence in the case at bar leads to the demonstrates there is no reasonable possibility in this case that the rather innocuous error-testimony that one police officer telephone another and asked if a friend could be 'cut a break' – could have contributed to the verdict.

The Fourth District Court of Appeal did not apply an impermissible harmless error standard, and its decision should be affirmed.

ARGUMENT

WHETHER THE FOURTH DISTRICT COURT OF APPEAL PROPERLY APPLIED THE HARMLESS ERROR TEST IN *GOODWIN V. STATE,* 721 So.2d 728, 73 1 (FLA. 4th DCA 1998) IN AFFIRMING PETITIONER'S CONVICTION (Restated).

Petitioner's conviction was affirmed in the Fourth District Court of Appeal relying in part on that Court's holding in *Goodwin v. State,* 721 So.2d 728, 73 1 (Fla. 4th DCA 1998). However in *Goodwin,* the Fourth District certified the following question of great public importance:

> IN APPEALS WHICH DO NOT INVOLVE CONSTITUTIONAL ERROR, DOES THE ENACTMENT OF SECTION 924.05 1(7), FLORIDA STATUTES, ABROGATE THE HARMLESS ERROR ANALYSIS ANNOUNCED IN [STATE V. DIGUILIO], 491 So.2d 1129 (Fla. 1986)?

Following the affirmance of the Fourth District Court of Appeal in the case at bar, on December 16, 1999, this Court issued its opinion in *Goodwin v. State,* 1999 WL 1186439 (Fla.) it which it reviewed the history of the harmless error rule as stated by this Court and embodied in section 924.051(7) Florida Statutes, and held that although "the Legislature has the authority to enact harmless error statutes , . . this Court retains the authority to determine the analysis to be applied in deciding whether an error requires reversal." *Goodwin,* 1999 WL 1186439 (Fla.), at pages 5-6.

In *Goodwin,* this Court clearly stated "that the enactment of section 924.05 1(7) merely reaffirms existing standards of review requiring the application of the DiGuilio' test to errors that are not per se reversible." The Court went on to say, "[W]e view the enactment of section 924.05 1(7) as a codification of existing law by referring to prejudicial error as 'harmful' error," and "[W]e find that *DiGuilio* defined 'harmful error' as error which 'an appellate court cannot say beyond a reasonable doubt. . . did not affect the verdict."'

The Court went on to say, "We interpret section 924.05 1(7) as a reaffirmation of the important principle that the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection." However the Court then added, "we hold that to shift the burden to the defendant would not only be an abdication ofjudicial responsibility, but could lead to the unjust result of an affirmance of a conviction even though the appellate court was not convinced beyond a reasonable doubt that the error did not affect the defendant's conviction." *Goodwin,* id., at page 9.

Applying the holding of this Court's recent *Goodwin* opinion to the case at bar, there is no question that the Fourth District Court of Appeal applied the proper harmless error standard and reached the proper conclusion. Three prosecution

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'*State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986).

witnesses, all of whom were well versed in observing the effects of intoxication, testified as to Petitioner's appearance, and opined that he was under the influence of alcohol (Tawil: T 46; Crowell: T 107; Forteza: T 163). For his part, Petitioner chose to take the stand and testify that he was merely tired. The complained-of testimony amounted to nothing more than an officer from one department calling another officer and asking whether he could "cut someone a break" (T 335). There was no evidence the Petitioner initiated the request. Tndeed, Petitioner's testimony that he is friends with a number of officers and although he complained of his troubles did not ask for their help, leads to nothing more than the simple conclusion that one of his friends was trying to help him out; surely a common-enough reaction which would raise few if any eyebrows on the jury. There is simply no way that such testimony reasonably can be bootstrapped into anything more.

The decision of the Fourth District Court of Appeal should be affirmed.

CONCLUSION

In the case at bar, the opinion of the Fourth District Court of Appeal did not apply the wrong harmless error standard. It did not err in finding the error in the trial court to be harmless, and its decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on the Merits" was sent by United States mail to CHARLES W. MUSGROVE, Esq., Attorney at Law, Congress Park, Suite l-D, 2328 South Congress Avenue, West Palm Beach, FL 33406 on March 27, 2000.

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