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IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-933

DCA NO. 3d99-47

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CHARLES L. BRYANT,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SCOO-933

CHARLES L. BRYANT,
Petitioner,

-vs-

THE STATE OF FLORIDA,
Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FLORIDA, THIRD DISTRICT

INTRODUCTION

This a petition for discretionary review on the grounds of express and direct conflict of decisions. In this brief, the symbol "R" designates the record on appeal, the symbol "T" designates the transcript of proceedings, and the symbol "S" designates the transcripts of proceedings which were bound separately.

STATEMENT OF THE CASE AND FACTS

Charles Bryant, the petitioner in this case, was convicted of attempted second degree murder by a jury. (R. 38). The computed sentencing scoresheet indicated a permitted sentencing range of 6.7 to 11.2 years. (S. 15, R. 44-5). The trial judge

entered a departure sentence, over defense objection, and sentenced Mr. Bryant to a term of fifteen years incarceration. (S. 15-6, R. 40). Although the trial judge articulated reasons in support of the departure during the sentencing hearing, (S. 20-22), a written order supporting the departure was never filed.

A notice of appeal was filed on December 29, 1998. (R. 52). Appellant's initial brief was filed on July 8, 1999, and raised the propriety of the lead detective's comments on Mr. Bryant's silence. On August 30th, 1999, a supplemental initial brief was filed with the district court's permission. The supplemental initial brief raised the trial court's failure to enter a written order, as well as the lack of evidence to support the departure sentence. The appellant's initial briefs were filed before enactment of the procedural rules in *Amendments to Florida Rules of Criminal Procedure 3. I I l(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9. I40 & 9.6000,* 761 So. 2d 1015 (Fla. 1999).

The Third District Court of Appeal affirmed the appellant's conviction and issued the following decision:

> Affirmed. State v. DiGuilio, 49 1 So. 2d 1129 (Fla. 1986); Jordan 728 So. 2d 748 (Fla. 3d DCA 1998) review granted, 735 So. 2d 1285 (Fla. 1999); Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), review granted, 729 So. 2d 396 (Fla. 1999).

On April 14, 2000, a notice to invoke this Court's discretionary jurisdiction was filed. The jurisdictional brief cited the Third District's reliance on *Jordan v. State, 728 So.* 2d 748 (Fla. 3d DCA 1998) *review granted,* 735 So. 2d 1285 (Fla. 1999), and *Weiss v. State,* 720 So. 2d 1113 (Fla. 3d DCA 1998), *review granted, 729* So. 2d 396 (Fla. 1999), both of which were before this Court at the time, as grounds warranting review before this Court. On November 13, 2000, this Court entered an order accepting jurisdiction and dispensing with oral argument.

As this case is properly before this *Court, State v. Lofton, 534 So.* 2d 1148, 1149 (Fla. 1988), and as this Court is thus vested with authority to entertain all issues affecting the outcome of the case, *Trushin v. State,* 425 So. 2d 1126, 1130 (Fla. 1983), *Angrand* v. Key, 657 So. 2d 1146, 1148 n.3 (Fla. 1995), petitioner also raises the lead detective's improper comments on the petitioner's silence as grounds warranting a new trial.

The Trial*.

The evidence established that Charles Bryant, Everett Steward, and Jose Zuniga lived in the same neighborhood. (T. 230, 255). On the day in question, Zuniga gave Steward a ride to his car which had been left on the side of the road due to a flat tire. (T. 2 15,230). As Steward changed the flat tire, Zuniga sat on the hood

of his car which was parked directly behind Steward's car. (T. 215, 23 1,247).

A car pulled up and parked alongside Zuniga's car. (T. 2 18, 23 1,247). The passenger opened the car door and displayed a firearm while he instructed Zuniga and Steward not to move. (T. 2 18- 19, 231, 247, 258). Steward told Zuniga not to worry because the people in the car were his "homeboys." (T. 2 18, 233). The passenger stayed behind the opened passenger door. (T. 235,247). The driver got out of the car, approached Steward and shot him. (T. 219-20, 233, 247, 248).

Zuniga ran around the corner and hid behind a building as soon as he saw the driver pull out the gun. (T. 220, 235, 25 1). He heard a shot as he turned the corner and climbed on top of the building to see what had happened. (T. 2 19-20). He saw the car pulling away and ran back to Steward who was laying against a fence bordering the sidewalk. (T. 220-210).

Officer Richardson was flagged down as he drove in the area and called Fire Rescue. (T. 203-04, 221, 206-07). After Fire Rescue responded, Steward was able to state his name and told Richardson he knew the identity of the person that shot him. (T. 249). In spite of this however, Richardson claimed he never asked Steward to give him the name of his assailant. (T. 208).

After Steward was removed from the scene, Richardson spoke to Zuniga and obtained descriptions of the suspects. (T. 210). Zuniga told Richardson that one

suspect was about five feet ten inches tall with brown eyes, black hair, and a short Afro. (T. 2 10). The other suspect was simply described as a black male approximately five feet tall. (T. 211). Although Bryant, who was also called Fats, weighed 350 pounds, (T. 3 10), Zuniga did not describe either suspect as being extremely overweight. (T. 2 11).

Detective Hedrick visited Steward at the hospital two days after the shooting. (T. 179). At that time, Steward gave the police officer a nickname identifying his assailant. (T. 180). Hedrick did not arrest Fats until several days later. (T. 189). Hedrick photographed Bryant after his arrest and prepared a photographic display. (T. 189-90). Steward and Zuniga both identified Fats as the driver of the car in the photographic display. (T. 190-96, 222, 226-28, 244, 254). Zuniga made his identification one day after Steward, (T. 199), and acknowledged speaking to Steward before the identification although he denied talking about it. (T. 226-27).

Zuniga also alleged that Fats visited his home the day following the shooting. (T. 223, 238). He stated that when he awoke, he heard his mother arguing with someone outside. (T. 223). As Zuniga approached, his mother told him to stay inside the house and closed the blinds. (T. 224). Zuniga claimed that Fats walked past the front of the house the remainder of the day. (T. 224). Zuniga stated he did not call the police although he believed Bryant was there because he was “looking for him”.

(T. 239).

Steward, who had recently been arrested for aggravated battery against someone in the apartment complex in which he lived, (T. 267), claimed he had an encounter with Fats two days before the incident. (T. 244). Steward stated that he and a friend visited the apartment complex where Fats lived. (T. 244). The apartment Steward visited was located next to Fats' apartment. (T. 244). Steward claimed that Fats threatened him with a firearm and asked Steward to explain what had happened to the "bar" upstairs. (T. 245). Steward responded that he didn't know what Fats was talking about and left. (T. 246).

Steward's mother and aunt picked Steward up from the hospital when he was discharged. (T. 252). As they were driving into the apartment complex parking lot, Fats approached and asked how Steward was doing. (T. 252,262). Steward asked Fats whether he still believed he had taken his property. (T. 252, 262). Fats responded that he did and became upset. (T. 252, 262). Steward's aunt, who was driving the car, pulled out of the parking lot. (T. 252).

Brenda Wright, Steward's mother, testified that she worked in the Liberty Laundry. (T. 272). She knew Bryant from the neighborhood because he took his clothes to the dry cleaners where she was employed. (T. 278). Ms. Wright claimed that Bryant visited her the day after the incident and admitted shooting Steward. (T.

275,277). He explained that he knew some of the boys from the neighborhood had broken into his apartment and that he was sure that one of the boys had been Steward. (T. 277). Despite the nature of this admission, Ms. Wright stated that she did not contact the police. (T. 277).

SUMMARY OF THE ARGUMENT

Sentencing in this case is controlled by this Court's decisions in *Maddox v. State, 760 So.* 2d 89 (Fla. 2000), and *Butler v. State,761 So.* 2d 3 19 (Fla. 2000), in which this Court held that a trial court's failure to enter written reasons supporting an upward departure can be raised on direct appeal during a prescribed window period and requires that an appellant's case be remanded for sentencing within the guidelines.

In addition, the lead detective's repeated references to the fact that he attempted to obtain a statement from the appellant Charles Bryant, were impermissible comments on Bryant's right to remain silent. As these impermissible comments placed before the jury the fact that Mr. Bryant did not make a statement when faced with what the defense contended was a false accusation, the error cannot be deemed harmless and warrants reversal of Mr. Bryant's conviction.

ARGUMENTS

I.

THE TRIAL COURT'S FAILURE TO ENTER A WRITTEN ORDER SUPPORTING THE DEPARTURE SENTENCEREQUIRES THAT THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL BE REVERSED AND THE CASE BE REMANDED FOR FURTHER PROCEEDINGS IN LIGHT OF *MADDOX v.* STATE, 760 So. 2d 89 (Fla. 2000) AND *BUTLER v.* STATE, 761 So. 2d 319 (Fla. 2000).

In the instant case, the Third District Court of Appeal relied upon *Weiss* v. *State, 720 So.* 2d 1113 (Fla. 3d DCA 1998), and *Jordan* v. *State,* 728 So. 2d 748 (Fla. 3d DCA 1998), to deny relief. The court also cited *State v. DiGuilio,* 491 So. 2d 1129 (Fla. 1986). This Court's subsequent affirmance of the district court's decisions in *Weiss* and *Jordan,* does not preclude relief in the instant case. *Weiss v. State, 76* 1 So. 2d 3 18 (Fla. 2000); *Jordan* v. *State,* 761 So. 2d 320 (Fla. 2000). Unlike *Weiss* and *Jordan* which involve departure sentences for which a written order supporting the departure was filed late, a written order supporting the departure sentence was never filed in this case. Therefore, this case is factually distinguishable from Weiss and *Jordan* and is governed by this Court's decisions in *Maddox v. State, 760 So.* 2d 89, 97 (Fla. 2000), and *Butler v. State,* 761 So. 2d 3 19 (Fla. 2000).

In *Maddox v. State, 760 So.* 2d 89, 97 (Fla. 2000), this Court held that a trial court's failure to file statutorily required written reasons for imposing an upward

departure sentence constitutes a fundamental sentencing error that may be raised on direct appeal during the window period created between the enactment of section 924.051(3) Fla. Stat.(Supp. 1996) and the enactment of the procedural rules in *Amendments to Florida Rules of Criminal Procedure 3.111(3) & 3.800 & Florida Rules of Appellate Procedure 9.020(h),* 9.140, & *9.600,* 761 So. 2d 1015 (Fla. 1999). *See also Collins v. State,* 766 So. 2d 1009 (Fla. 2000). In addition, this Court held that the "policy reasons for correcting a departure sentence in which the trial court failed to file statutorily required written reasons for departure" remained in existence after enactment of the Criminal Reform Act. *Maddox v. State, 760 So.* 2d at 107.

This Court then articulated its disapproval of the First District's decision in *Butler v. State, 723 S.* 2d 865 (Fla. 1st DCA 1998), *quashed,* 761 So. 2d 319 (Fla. 2000), in which the First District had held that a trial court's failure to enter a written order supporting a departure sentence under circumstances like those presented in this case could not be raised on appeal. *Maddox v. State, 760 So.* 2d at 107. *Accord Edwards v. State,* 25 Fla. Law Weekly S 1056 (Fla. November 11, 2000); *Collins v. State,* 766 So. 2d 1009 (Fla. 2000).

The First District's decision was subsequently quashed and remanded for further proceedings in light of *Maddox. Butler v. State,* 761 So. 2d 319 (Fla. 2000). On remand, the First District acknowledged that in spite of the trial court's oral

pronouncements at sentencing supporting the departure sentence, the failure to enter a written order required that the defendant's case be remanded with instructions that the trial court impose a guideline sentence pursuant to *Pope v. State, 561 So.* 2d 554 (Fla. 1990). *Butler v. State,* 765 So. 2d 274, 275 (Fla. 1st DCA 2000); See *also Collins v. State,* 765 So. 2d 306 (Fla. 1st DCA *2000); Ward v. State, 765 So.* 2d 299, 301 (Fla. 5th DCA 2000); *Edwards v. State,* 770 So. 2d 179 (Fla. 1st DCA 2000); *Foreman v. State,* 25 Fla. Law Weekly D2597a (Fla. 2d DCA November 1, 2000).

It is thus clear that a defendant may raise the trial court's failure to enter a written order supporting a departure sentence on direct appeal within the prescribed window period, and that the failure to enter a written order supporting the departure requires that the trial court impose a guideline sentence pursuant to this Court's decision in *Pope.* Charles Bryant, the petitioner in this case raised the sentencing issue on direct appeal to the Third District Court of Appeal during the prescribed window period. Therefore, the trial court's failure to enter a written order supporting a departure sentence in this case requires that the trial judge impose a guideline sentence.

II.
THE POLICE OFFICER'S REPEATED REFERENCES TO HIS ATTEMPTS TO OBTAIN A STATEMENT FROM THE APPELLANT COUPLED WITH THE PROSECUTIONS COMMENT DURING CLOSING ARGUMENT INDICATING THAT THE DEFENSE HAD NOT PRESENTED ANY EVIDENCE REQUIRE THAT THE APPELLANT'S CONVICTTON BE REVERSED AND THIS CASE REMANDED WITH INSTRUCTIONS THAT THE APPELLANT BE GRANTED A NEW TRIAL.

The lead detective in this case repeatedly told the jury that he attempted to obtain a statement from Mr. Bryant. These comments constituted an impermissible comment on Bryant's right to remain silent and warrant reversal.

Florida has adopted a liberal rule for determining whether a comment constitutes a comment on silence. *State v. DiGuilio*, 491 So. 2d 1129, 1136 (Fla. 1986). The standard of review for determining whether testimony is an infringement on a defendant's right to remain silent is whether the testimony is "fairly susceptible" to an interpretation which would bring it within the prohibition against comments on silence. *State v. Kinchen*, 490 So. 2d 21, 22 (Fla. 1985); *State v. Thornton,* 491 So. 2d 1143, 1144 (Fla. 1986). Comments or arguments which can be construed as relating' to the defendant's failure to testify are, obviously, of almost unlimited variety." *State v. DiGuilio, 49* 1 *So.* 2d at 1136, *quoting* Annotation, Comment or Argument by Court or Counsel that Prosecution Evidence is Uncontradicted as

Amounting to Improper Reference to Accused Failure to Testify, 14 A.L.R. 3d 723, *726-27.* In *DiGuilio*, this Court noted that these comments "are high risk errors because there is a substantial likelihood that meaningful comments will vitiate the right to a fair trial influencing the jury verdict." *Id.*

Although the officer in this case never directly indicated that Mr. Bryant refused to make a statement, *see J.D. v. State,* 553 So. 2d 13 17 (Fla. 3d DCA 1989), comments such as the ones in this case, concerning the fact that the accused was read the *Miranda* rights and that police attempted to interview the accused, have been held impermissible comments on the right to silence.

In *Hazelwood v. State,* 658 So. 2d 1241 (Fla. 4th DCA 1995), a detective's testimony concerning his attempts to interview the defendant were held to be an improper comment on the defendant's right to remain silent where the detective stated that he "attempted to interview" the defendant after the defendant was taken into custody. *Id.* at 1242. Although the court ultimately ruled the comment harmless, the court reasoned that the comment was "fairly susceptible" of being interpreted as referring to the defendant's failure to testify because the "comment reasonably suggested to the jury that any attempt to interview [the defendant] failed because [the defendant] refused to talk to the police." *Id.* at 1243.

The same reasoning was employed in *West v. State,* 553 So. 2d 254 (Fla. 4th

DCA 1989), *disapproved on other ground, State v. Norstrom, 6 13 So.* 2d 437 (Fla. 1993), in which the appellate court concluded that repeated references to the fact that the defendant was read the *Miranda* rights constituted comments on the defendant's right to remain silent and warranted reversal of the defendant's conviction for DUI manslaughter. During the direct examination of one of the police officers, the officer made a reference to the reading of the *Miranda* rights which was interrupted by the prosecutor. In response to a question regarding the events of the night, the officer stated that the defendant was "read the rights from the Miranda cards, at which time the defendant advised he understood them and -." *Id.* at 257.

A second reference to the reading of the *Miranda* rights was made during another officer's testimony: "I did read Mr. West his Miranda rights as well as the implied consent and before the lab technician drew the blood I asked him if he understood the rights and he said, 'Yes' he did, And, I asked if he would answer any of my questions an - ." *Id.* The court ruled that these references were "fairly susceptible to an interpretation that they were comments of West's exercise of his right to remain silent" and concluded that their admission was erroneous. *Id.* at 257.

The reasoning employed in these cases warrants the same conclusion in the instant case. The detective in this case repeatedly told the jury that attempts were made to obtain a statement from Mr. Bryant. The first occurred when he indicated

that one of the significant aspects of being a lead detective was the fact that he was required to interview the defendant upon his apprehension: "When the subject is apprehended we are generally the one that does the interview unless there's some type of circumstances that maybe a supervisor does," (T. 185). This comment was followed by the detective's explicit statement that he "attempted to interview the subject." (T. 187). These comments were then further underscored by the officer's subsequent statement that the read Mr. Bryant the *Miranda* rights. (T. 196).

These comments, like the comments in *Hazelwood* and *West,* were clearly susceptible of being interpreted as a comment on Bryant's right to remain silent. The officer's repeated reference to the fact that he read Bryant the *Miranda* rights and that he attempted to interview Bryant suggested that the officer's attempt to interview him failed because Bryant refused to make a statement. *See, State v. Thornton,* **491 So.** 2d at 1 144. (officer's comments that he read the defendant *Miranda,* that the defendant indicated he understood and that he did not answer any questions were improper comments on defendant's right to remain silent where the defendant exercised his right to remain silent after the Miranda warnings and made no statements).

Comments on silence are not harmless if the evidence against a defendant is not clearly conclusive. *J.D. v. State, 553 So.* 2d at 13 19; *Smith v. State, 681 So.* 2d 894,

896 (Fla. 4th DCA 1996). In spite of the identifications made in the instant case, the evidence of Mr. Bryant's guilt was not conclusive. The defense maintained that the critical issue to be decided by the jury was the credibility of the witnesses' identification of Charles Bryant as the offender. (T. 167, 309). Motive for the misidentification was based upon the fact that the victim, who had recently been arrested and charged with aggravated battery (T. 267), knew the real shooter and was afraid that an identification would lead to reprisals. (T. 3 1 1- 12, 167).

The evidence established that Steward and Zuniga spoke before the police showed them the photographic display, (T. 226-27), thus allowing what the defense maintained was an opportunity for collusion between the two. (T. 3 1 1- 12). It was apparent that Charles Bryant was extremely overweight. (T. 3 10). However, in spite of this striking physical characteristic, neither offender was described by Zuniga or Steward as being overweight immediately after the incident occurred. (T. 211).

Application of the harmless error test "requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict." *State v. DiGuilio, 49* 1 So. 2d at 1138. The impermissible testimony in this case put before the jury the fact that Mr. Bryant refused to make a statement to police when faced with what the defense contended

was a wrongful accusation. Given the defense assertion that Zuniga and Steward were purposefully identifying the wrong person, the jury may well have considered the officer's repeated references to his attempts to obtain a statement from Mr. Bryant and Bryant's failure to make a statement as evidence of Bryant's guilt.

Moreover, the cumulative effect of these statements rendered the trial court's curative instruction following the first two improper comments ineffective. This is especially true in light of the court's failure to give another curative instruction after the third comment. *Redish v. State,* 525 So. 2d 928, 931 (Fla. 1st DCA 1988)(cumulative effect of comments requires reversal despite court's curative instruction); *Brown v. State,* 593 So. 2d 12 10, 12 11 (Fla 2d DCA 1992) (combination of prosecutor's cements renders comments prejudicial and requires reversal). The impact of the comments was also augmented by the prosecution's statement during closing statement in which the state argued that the defense had presented "no evidence." (T. 333).

The cumulative effect of these comments served to improperly imply culpability by highlighting Bryant's assertion of his Fifth Amendment right to remain silent. As such, the state is unable to show "there is no reasonable possibility that the error contributed to the conviction", *DiGuilio v. State,* 491 So. 2d at 1135, and Mr. Bryant's conviction must be reversed and remanded for a new trial.

CONCLUSION

Based on the foregoing facts, authorities and arguments, appellant requests that this Court to reverse with instructions that the appellant be sentenced under the guidelines and that he receive a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33 128, this 12th day of December, 2000.

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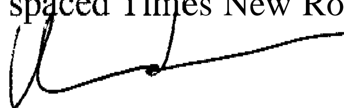

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