IN THE SUPREME COURT OF FLORIDA

RAYMOND EDWARD BARNES,	:	
Petitioner,	:	
VS.	:	CASE NO. SC02-1413
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

REPLY BRIEF OF PETITIONER ON THE MERITS

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I ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR IN FAIL-ING TO INSTRUCT THE JURY THAT ONE OF THE ELEMENTS OF POSSESSION OF A CONTROLLED SUBSTANCE WAS THAT THE DEFENDANT MUST KNOW IT IS AN ILLICIT SUBSTANCE; BARNES'S DEFENSE WAS THAT HE DID NOT KNOW IT WAS A CONTROLLED SUBSTANCE.

The state's answer consists of a series of erroneous pre-mises: First, the state argues that defense counsel's failure to request a jury instruction on illicit knowledge constitutes an affirmative waiver of the instruction. Second, the state argues the error is not fundamental because Chicone and its progeny involved the denial of a requested jury instruction. Chicone v. State, 684 So.2d 736 (Fla. 1996). However, this argument ignores the general rule that failure to instruct on a disputed element is fundamental error. Third, the state misapprehends the holding of State v. Medlin, 273 So.2d 394 (Fla. 1973).

Fourth, the state argues that the legislature has recently enacted a statute which provides that knowledge is not an element, but rather, an affirmative defense. However, the state fails to explain how that statute could be applied retroactively to petitioner Barnes, without violating the constitutional prohibition of ex post facto laws.

Failure to object versus affirmative waiver

The state argued that "when defense counsel requests or affirmatively agrees to the omission or alteration of a jury instruction," the error is not fundamental (State's Answer Brief, p. 8). In support, the state cited Armstrong v. State, 579 So.2d 734 (Fla. 1991); State v. Lucas, 645 So.2d 425 (Fla. 1994), Singletary v. State, 829 So.2d 978 (Fla. 1st DCA 2002); Hanks v. State, 786 So.2d 634, 635 (Fla. 1st DCA 2001), review denied 805 So.2d 807 (Fla. 2001); Firsher v. State, ____ So.2d ____, 28 Fla. L. Weekly D217 (Fla. 3d DCA Jan. 15, 2003); Summers v. State, 672 So.2d 617 (Fla. 5th DCA 1996) (AB-8). Not one of these cases supports the state's position that affirmative waiver occurred in the instant case.

In Armstrong,

> Counsel requested the limited instruction [on excus-able homicide] in order to tailor it to the defense that the killing was accidental. **By affirmatively requesting the instruction** he now challenges, Arm-strong has waived any claim of error in the instruc-tion. . .(emphasis added).

579 So.2d at 735. Unlike Armstrong, Barnes's counsel did not object to omitting the instruction, but he not affirmatively request that it be omitted, and he did not rely on the omission in closing argument. In Lucas and Summers, there was no affir-mative request for a modified instruction on excusable and jus-tifiable homicide, thus the failure to instruct was fundamental error. Barnes asks for the same ruling here.

Contrary to the state's argument Van Loan v. State, 736 So.2d 803, 804 (Fla. 2d DCA 1999), explains that the Armstrong exception does not apply here:

> Before [the Armstrong] exception applies, defense counsel must be aware of the omission, alteration, or incomplete instruction and affirmatively agree to it. Cf. Black v. State, 695 So.2d 459, 461 (Fla. 1st DCA 1997). In the instant case, **there is no indication that Van Loan's trial counsel knew that the omission was error and agreed to the omission.** The trial court shoulders the responsibility to properly instruct the jury on the definitions of excusable and justifiable homicide. (emphasis added)

Similarly, here, it appears from the face of the record that defense counsel misunderstood that there were two knowledge elements in the crime.

In Singletary,

> Singletary's counsel not only failed to object to the instruction, but actually agreed to it, specifically acknowledging that he had no objections. Moreover, counsel affirmatively, and with Singletary's assent, admitted to the jury that he had no defense to the fleeing and eluding

charge. This is a case of affirmative waiver. 829 So.2d at 979. Barnes's attorney only failed to object; he did not agree to the omission.

While Hanks relied on Armstrong, the case did not involve a jury instruction, but rather, defense counsel's affirmative agreement that a doctor's deposition could be read in evidence in lieu of live testimony. Hanks argued on appeal that this deprived him of his constitutional right to confront a witness. This court held he waived it. Firsher is also inapposite. Firsher argued on a 3.850 motion that trial counsel was inef-fective for failing to request an instruction on attempted manslaughter. The district court rejected the claim because the omitted crime did not meet the one-step-removed rule.

In Blandon v. State, 657 So.2d 1198, 1199 (Fla. 5th DCA 1995), the question was again whether the trial court committed fundamental error in failing to give the standard jury instruc-tion on justifiable and excusable homicide in an attempted murder charge. The district court held:

> Even though Blandon never requested the instruction for justifiable and excusable homicide, we hold that the trial court erred by not reading it.

Id. Of Armstrong, the court said:

> We also have considered whether Blandon waived this error for purposes of appeal under. . .Armstrong [supra], when he failed to request the

> instruction or to object at the trial level when the instruction was not given. Blandon specifically requested jury instructions on aggravated battery with a deadly weapon, aggravated assault, and simple battery, but he did not request the instruction for justifiable and excusable homicide. Under Armstrong a defendant may waive the need to give the instruction if the defendant affirmatively agrees to or requests an incomplete instruction. . .Fundamental error analysis would not apply if the defendant knowingly waived the giving of the complete instruction. We conclude, however, that Armstrong is inapplicable to the facts of this case.
>
> In Armstrong, defense counsel specifically reques-ted [an] abbreviated version of the standard instruc-tion. The Florida Supreme Court held that, "[b]y affirmatively requesting the instruction he now challenges, Armstrong has waived any claim of error in the instruction." Id. If defense counsel makes a tactical decision to request a limited instruction, the defendant cannot benefit from that decision on appeal. Id. In the case sub judice, **defense counsel for Blandon did not request a limited or abbreviated instruction for** justifiable and excusable homicide. **Since he did not, there was no waiver.** It was the trial court's responsibility to see that the jury was properly instructed. . . (emphasis added)

657 So.2d at 1199-1200. See also Roberts v. State, 694 So.2d 825, 826 (Fla. 2d DCA 1997)(“Since defense counsel did not affirmatively agree to the omission of the instructions, but only acquiesced in the instructions as given, the [Armstrong] exception does not apply”).

Defense counsel failed to object, but he did not affirma-tively waive the jury instruction error. Since the error went to a disputed element, it was fundamental.

Whether error is fundamental

The state argues that Chicone and its progeny, and also this court's recent opinion in Reed, are all distinguishable because they involved the denial of a **requested** jury instruc-tion. Even if that were true, there is a separate line of cases holding that the failure to instruct on a disputed element is fundamental error. State v. Delva, 575 So.2d 643, 645 (Fla. 1991), is a seminal case in this area. The state did not cite Delva, or in way distinguish this line of cases from the instant case.

Medlin

The state argued

> In Medlin, this court held that in an **actual** posses-sion case, the "State was not required to prove intent to violate the statute **or defendant's specific knowledge of the contents of the capsule**." (emphasis added in state's brief)

(AB-12). While it is true that this court's opinions in both Chicone and Scott support this argument to some degree, peti-tioner contends this court should reconsider the Medlin pre-sumption where the charge is possession, as opposed to sale or delivery, and should reconsider the applicability of this presumption where the drug is not contraband per se. Scott v. State, 808 So.2d 166 (Fla. 2002). That is, where a prescrip-tion drug is involved, as opposed to cocaine or marijuana.

In the context of sufficiency of the evidence rather than jury instructions, Medlin said knowledge and intent could be presumed from doing the prohibited act of sale or delivery. Even though Chicone held illicit nature was an element - which places the burden of proof on the state - Scott held that Chi-cone did not overrule the Medlin presumption of knowledge and intent.

Medlin was charged with giving a barbiturate to a 16-year-old girl. This court said:

> [Medlin] is charged with. . .unlawfully delivering. . .a barbiturate or central nervous system stimulant. Proof that defendant committed the prohibited act raised the presumption that the act was knowingly and intentionally done. Defendant then sought to prove lack of knowledge as to the nature of the drug deli-vered to Cathy Driggers. But the testimony of the Driggers girl, that he told her one capsule would make her 'go up' and another pill was to be taken when she came down from the high, is evidence that defendant was aware of the nature of the drug involved. The proper arbiter was the jury.

273 So.2d at 397. The court continued:

> To reiterate, **the State was not required to prove knowledge or intent since both were presumed from the doing of the prohibited act.** Defendant's attempt, by way of defense, to prove lack of knowledge was rebutted by the Driggers girl's testimony which the jury was entitled to accept over that of the defendant. (emphasis added)

Id.

Medlin said the state did not have to prove intent or knowledge because both were presumed from the act itself.

Such a presumption relieves the state of the burden of proof of those elements. Twenty-three years later, Chicone stated clearly and unambiguously that illicit nature is an element of the offense on which the jury must be instructed.

Because both elements were proved in Medlin, the outcome there might still be affirmed today, but the erroneous failure to require proof of and instruction on all the elements of the offenses cannot be forgiven in the instant case. Rather, Med-lin and Chicone are inconsistent on this point and cannot be reconciled.

It is possible a presumption may be permitted from sale or delivery which is not permitted from possession, especially but not only, from constructive possession. That may explain why this court denied review in Ryals v. State, 716 So.2d 313 (Fla. 4th DCA), review denied, 727 So.2d 910 (Fla. 1998), in which the Fourth District said:

> Cocaine was asked for and cocaine was delivered and sold. No jury of reasonable persons could have con-cluded that [Ryals] did not know the substance being delivered was cocaine. Not only has [Ryals] failed to demonstrate prejudicial error, but also it is clear beyond a reasonable doubt that the error was harmless.

Id. Unlike Ryals, no cocaine was asked for or sold here. Absent this crucial fact, the conclusion that followed - that no reasonable jury could have concluded Ryals did not know the substance was cocaine - fails when applied to the

far less conclusive evidence against Barnes. Nothing was asked for here, nothing delivered, nothing sold, and it is only a con-structive possession theory that links Barnes to contraband **not** in his possession.

Ex post facto change in statute

The state argues that a new statute - which makes know-ledge an affirmative defense, not an element - can be applied retroactively to Barnes, who was charged with this crime long ago. The state does not offer one word to explain how a statute could be applied to Barnes without violating the constitutional prohibition against ex post facto laws.

Because the jury was not instructed on a disputed element, Barnes is entitled to new trial.

ISSUE II

THE TRIAL COURT ERRED IN DENYING PETITIONER BARNES'S MOTION TO SUPPRESS; THE DEPUTIES' VIEW OF AN UNKNOWN SUBSTANCE IN A PLASTIC BAG DID NOT GIVE THEM A FOUNDED SUSPICION NECESSARY TO JUSTIFY A TERRY STOP; WITHOUT A FOUNDED SUSPICION, BARNES HAD THE RIGHT TO WALK AWAY; WHEN THE OFFICERS WOULD NOT LET HIM WALK AWAY, HE RAN, BUT THAT FACT DOES NOT TRANSFORM AN INVALID STOP INTO A VALID ONE; WARDLOW IS NOT ON POINT.

Petitioner relies on the argument made in his initial brief, except to point out that the state's argues Barnes's "refusal to stop when asked" supports the officer's belief that a Terry stop was justified (AB-22-23). Terry v. Ohio,

392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Contrary to this argument, a defendant has the right to refuse to stop when asked until the officers express a justification for a Terry stop, which they had not done at the time.

II CONCLUSION

Based upon the foregoing analysis, arguments, and authori-ties, petitioner respectfully requests that this court find he entitled to new trial due to fundamental error in the jury instructions, or in the alternative, hold the trial court erred in denying the motion to suppress and remand for discharge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Robert L. Martin, Assistant Attorney General, The Capitol, Tallahassee, FL, and a copy has been mailed to Mr. Raymond E. Barnes, 4281 Tomahawk Trail, Milton, FL 32583 this _____ day of February, 2003.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

KATHLEEN STOVER