IN THE FLORIDA SUPREME COURT

TONY HOBBS,

Petitioner,

v. **CASE NO. SC02-1679**

STATE OF FLORIDA,

Respondent.
_____/

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant, below, and will be referenced as “Petitioner” or as “Mr. Hobbs” in the following brief. A one-volume record on appeal will be referenced by ‘R’, followed by the appropriate page number in parenthesis. A one-volume transcript of jury trial will be referenced by ‘T.’ A one-volume transcript of sentencing and hearing on motion for new trial will be referenced by ‘S.’ All proceedings below were before the Honorable William L. Gary.

STATEMENT OF THE CASE

By information filed on June 16, 1999, Petitioner was charged with sexual battery on a child under 12 per Section 794.011, Fla. Stat. (R 3) The cause proceeded to jury trial on April 20, 2000, whereupon a verdict of “guilty, as charged” was returned (R 24). The cause proceeded to sentencing on May 10, 2000, whereupon Petitioner was adjudicated guilty and sentenced to life in prison with a 25-year mandatory, minimum (R 28-32).

A timely notice of appeal was filed and the Public Defender was appointed to represent Mr. Hobbs on direct appeal (R 35, 41). The First District Court of Appeals ruled that the issue was not preserved for review. See, ***Hobbs v. State***, 820 So. Ed 347 (Fla. 1st DCA 2002). Upon motion for rehearing/certifica- tion, the First District denied the motion for rehearing, but certified its ruling as being in conflict with ***Pritchett v. State***, 566 So. 2d 6 (Fla. 2nd DCA 2000). This appeal follows.

STATEMENT OF THE FACTS

Before the 23-year-old victim took the stand to testify, the prosecutor requested the court clear the courtroom. The prosecutor did not reference Section 918.16, Fla. Stat.; nor did the judge. The judge cleared the courtroom of "everyone," but the victim-witness advocate (T 34, 35). Defense Counsel, jurors and the court reporter were allowed to remain, though the court made no reference to them. Presumably, Petitioner's family and the press were excluded. Petitioner did not object.

SUMMARY OF THE ARGUMENT

The trial court implicitly excluded Petitioner's family and the press for testimony of the sexual battery victim. Section 918.16, Fla. Stat., expressly provides that a defendant's family and the press may not be excluded. Failure to comply with the strictures of Section 918.16, Fla. Stat., constitutes a total or greater-than-partial closure of the courtroom, thereby triggering the requirement of procedures set forth by the United States Supreme Court to ensure the protection of a defendant's consti- tutional right to a public trial. Although Petitioner did not object, at trial, a constitutional right may not be waived by silence; hence, the issue constitutes fundamental error, review- able for the first time on appeal.

ARGUMENT

WHETHER CLOSING THE COURTROOM WITHOUT COMPLYING WITH SECTION 918.16, F.S., CONSTITUTES FUNDAMENTAL ERROR.

The trial court did not comply with Section 918.16, Fla. Stat. It excluded Petitioner's immediate family and the press. Petitioner did not object. Nonetheless, because the court did not comply with the requirements of ***Waller v. Georgia***, 476 U. S. 39, 47, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984) for a total closure, or with the requirements for a partial closure pursuant to Section 918.16, Fla. Stat, Appellant was denied his Sixth Amendment right to a public trial. See, also, Article 1, Section 16, Florida Constitution. The issue before this court is whether the error is fundamental and, therefore, reviewable for the first time on appeal.

The First District Court of Appeals ruled, below, that it is not fundamental error because the trial court's actions resulted in, only, a partial closure of the courtroom. See, Appendix 'A.' The First District's decision is wrong because the trial court's actions resulted in a closure of the courtroom which would be more accurately characterized as a total closure than a partial closure.

Total versus partial closure

It is well-settled that total closure of the courtroom constitutes fundamental error unless the court follows the procedural analysis set forth in ***Waller***, **Id**. The Florida Legislature created Section 918.16, Fla. Stat., as a means of allowing for a partial closure of the courtroom which, if properly implemented, does not require the ***Waller*** analysis. See, also, ***Roberts v. State***, 816 So. 2d 1175 (Fla. 2nd DCA 2002); ***Whitson v. State***, 791 So. 2d 544 (Fla. 2nd DCA 2001). That is, if the court follows the requirements of the statute, then the resulting closure qualifies as only "partial" and there is no need to institute the ***Waller*** analysis in order to protect a defendant's right to a public trial. Likewise, any claim that a proper implementation of the statute has failed to protect a defendant's right to a public trial must be preserved by an appropriate objection.

In this case, however, the trial court did not properly implement the statute which allows, "immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, court reporters, and at the request of the victim, victim or witness advocates ...." Because the trial court excluded the defendant's family and the press, the resulting closure was "total" or, at least, it was closed to such a degree that it

could not avoid the requirement of a ***Waller*** analysis. An objection is not necessary because the improper implementation of the statute renders the statute unconstitutional.

Section 918.16, Fla. Stat., does not say that the judge will allow the qualifying persons to remain in the courtroom, *only if the defendant objects to their exclusion.* It says that *the judge shall clear the courtroom of all persons ... except* those persons qualified under the statute to remain. If the statute was created to protect a defendant's right to a public trial by ensuring only a partial closure (and this must be the state's position if it intends to avoid requirement of the ***Waller*** analysis in this case), then presumably, failure to comply with the statute results in something greater than a partial closure and the ***Waller*** analysis must be invoked to ensure that the defendant's right to a public trial is not infringed.

Petitioner concedes that Section 918.16, Fla. Stat., is constitutional, and that there is no need to perform the ***Waller*** analysis if, *and only if,* the court complies with its strictures. See, ***Robertson v. State***, 64 Fla. 437, 60 So. 118 (1912); ***Douglas v. State***, 328 So. 2d 18 (Fla.) cert. denied, 429 U.S. 871, 97 S. Ct. 185, 50 L. Ed. 2d 151 (1976) ie, 328 So. 2d 18 (Fla.) cert. denied, 429 U.S. 871, 97 S. Ct. 185, 50

L. Ed. 2d 151 (1976). But, allowing the court to merely state that it is attempting to achieve a partial closure or merely cite to the statute, without regard to whether the resulting closure is truly total or partial, allows the court to avoid procedures the United States Supreme Court has deemed necessary to protect a defendant's right to a public trial.

Constitutional rights may not be waived by silence

A closure of the courtroom which is not in compliance with the statute constitutes a fundamental violation of the defendant's right to a public trial, a right which may not be waived by the defendant's silence. See, ***Brady v. U.S.***, 397 U.S. 742, 90 S. Ct. 1863, 25 L. Ed. 2d 747 (1970)(Waiver of a consti- tutional right must be knowing, voluntary and intelligent.); and ***State v. Upton***, 658 So. 2d 86 (Fla. 1995)(Waiver of the constitu- tional right to trial by jury may not be inferred from written waiver by counsel). According to ***Waller***, **Id.**, a total closure without the required analysis constitutes fundamental error. See, also, ***Pritchett v. State***, 566 So. 2d 6 (Fla. 2nd DCA 1990). In this case, a total or greater-than-partial closure was effected without a valid waiver by Petitioner. Hence, the error below constitutes fundamental error which may be reviewed for the first time on appeal. See, generally, ***State v. Johnson***, 616

So. 2d 1 (Fla. 1993). The judgement and sentence must be vacated and the cause remanded for a new trial.

CONCLUSION

Based on the foregoing analysis, caselaw and other citation of authority, Appellant requests this Honorable Court vacate the judgement and sentence below and remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Kenneth Pratt, Assistant Attorney General, by U.S. mail to The Capitol, Plaza Level, Tallahassee, Florida, and to Mr Tony Hobbs, DOC# 877221, Okaloosa Corr. Inst., 3189 Little Silver Road, Crestview, FL 32539, on this ____ day of August, 2002.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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