IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-664

**GERALD PETION**,

Petitioner,

- versus -

**STATE OF FLORIDA**,

Respondent.

# RESPONDENT'S BRIEF ON THE MERITS


BILL McCOLLUM
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401-3432
Tel: (561) 837-5000
Fax: (561) 837-5099
E-Mail: DCAFilings_4th@oag.state.fl.us

Counsel for Respondent

## Table Of Contents

**Page:**

## Table Of Citations

**Cases:** **Page:**

## Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

## Statement Of The Case And Facts

Respondent relies upon those facts set forth in the opinion of the Fourth District Court of Appeal in the instant case, Petion v. State, 4 So. 3d 83 (Fla. 4th DCA 2009).

## Summary Of The Argument

The decision of the Fourth District Court of Appeal should be affirmed because the court properly applied the long standing rule that when a trial judge, sitting as a trier of fact, erroneously admits evidence, the judge is presumed to have disregarded that evidence. Because the Third District has effectively overruled its decision in J.D. v. State, 553 So. 2d 1317 (Fla. 3d DCA 1989), the State suggests that conflict jurisdiction has been improvidently granted.

The application of this presumption to bench trials does not conflict with this Court's pronouncement in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), that to show harmless error, the State must prove beyond a reasonable doubt that the error did not contribute to a finding of guilt.

## Argument

**THE REBUTTABLE PRESUMPTION THAT A TRIAL COURT, WHEN SITTING AS THE TRIER-OF-FACT, WILL DISREGARD INADMISSIBLE EVIDENCE, DOES NOT IMPROPERLY SHIFT THE BURDEN TO A DEFENDANT TO SHOW THAT THE ERROR DID NOT CONTRIBUTE TO THE VERDICT**.

Petitioner claims that the Fourth District's application of the rebuttable presumption that the trial court, when sitting as a trier-of-fact, is presumed to disregard inadmissible testimony, was erroneous. According to Petitioner, the application of this rebuttable presumption in non-jury trials improperly imposes upon a defendant the burden of demonstrating that an error contributed to the trial court's finding of guilt. Petitioner contends that it is virtually impossible for a defendant to demonstrate that an error contributed to the trial court's verdict. Petitioner concludes that the presumption should be abrogated and that the same standard of review should be applied regardless of whether a defendant has a jury or a bench trial.

Petitioner's argument strikes at the heart of one of the basic tenets of a bench trial: that despite the admission of irrelevant evidence and what, for a jury, would be prejudicial evidence, it is presumed that a trial judge will consider only admissible evidence in making his/her findings. The law on this issue is clear, consistent and longstanding. The United States Supreme Court in Sinclair v.

United States, 279 U.S. 749, 767 (1929), in addressing a criminal defendant's charge that admission of certain evidence at a bench trial was error, stated:

> In answer, we need only refer to what was said in United States v. King, 7 How. 833, 854, 855 [12 L. Ed. 934]: "In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the cause as if it was not in the record."

In Harris v. Rivera, 454 U.S. 339, 346 (1981) (per curiam), the Court recognized that the presumption of judicial regularity is basic to bench trials:

> In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries that no adverse inference may be drawn from a defendant's failure to testify; surely we must presume that they follow their own instructions when they are acting as fact finders.

This Court has adopted the rule that in criminal bench trials, "[e]ven where a judge erroneously admits improper evidence, the judge as factfinder is presumed to disregard it." Guzman v. State, 868 So. 2d 498, 511 (Fla. 2003) (citing State v. Arroyo, 422 So. 2d 50, 51 (Fla. 3d DCA 1982)). This presumption is overcome only where the record discloses that the trial judge considered the erroneous evidence. Arroyo, 422 So. 2d at 51. Once a defendant makes such a showing, the analysis then proceeds under State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), and

the State is required to show, beyond a reasonable doubt, that the error did not contribute to the finding of guilt.

Similarly, other courts have stated that "[i]t is well settled that in a non-jury trial the introduction of incompetent evidence does not require a reversal in the absence of an affirmative showing of prejudice." United States v. McCarthy, 470 F.2d 222, 224 (6th Cir. 1972). "The presumption is that the improper testimonial evidence, taken under objection, was given no weight by the trial judge and the Court considered only properly admitted and relevant evidence in making its decision." Id. at 224.

The Seventh Circuit's opinion in United States v. Menk, 406 F.2d 124 (7th Cir. 1968), cert. denied, 395 U.S. 946 (1969), is instructive. In that case, the court found the admission of certain evidence in a bench trial to be erroneous:

> We therefore hold that the admission of such evidence constituted error, and if this had been a jury trial we would be compelled to reverse. However, since this was a bench trial and since it appears from the record that the trial judge did not consider the erroneously admitted evidence in reaching his findings of fact, we hold that the error does not justify reversal.

Id. at 126 (citations omitted). The court further stated that "[a]lthough, we cannot probe the mind of the trial judge any more thoroughly, we likewise cannot presume error by inferring that he considered the improperly admitted evidence in reaching

his findings." Id.

The court quoted the following from United States v. Bolden, 355 F.2d 453, 456 (7th Cir. 1965), cert. denied, 384 U.S. 1012 (1966):

> Trial judges are invariably called upon to conduct impartial trials despite whatever opinion they may have or which they may formulate during the course of the trial concerning the guilt or innocence of an accused. Such impartiality is precisely what is expected of them, and an experienced trial judge must be assumed capable of performing his essential function. In short, prejudice must be shown by trial conduct; it may not be presumed or inferred from the subjective views of the judge.

United State v. Menk, 406 F.2d at 127.

The court ultimately held "that a trained, experienced Federal District Court judge, as distinguished from a jury, must be presumed to have exercised the proper discretion in distinguishing between the improper and the proper evidence introduced at trial, and to have based his decision only on the latter, in the absence of a clear showing to the contrary by appellant." Id. at 127.

Thus, it is a well-established rule in most appellate courts that the admission of incompetent evidence over objection will not, ordinarily, be a ground for reversal if there was competent evidence sufficient to support the findings, since the judge will be presumed to have disregarded the inadmissible and relied on competent evidence.

Consistent with this longstanding precedent, the Fourth District stated in the present case that the trial court, when sitting as the trier-of-fact, is presumed to have disregarded erroneously admitted evidence. Petion v. State, 4 So. 3d at 87. The Fourth District further stated such presumption is rebuttable, and cited to its prior opinion in C.W. v. State, 793 So. 2d 74 (Fla. 4th DCA 2001), wherein it stated that such a presumption is overcome where the record affirmatively reflects that the trial judge relied on the inadmissible evidence. In the present case, the Fourth District concluded that nothing in the record suggested that the trial court relied on the inadmissible evidence.

Petitioner sought discretionary review in this Court, alleging that the Fourth District's opinion in this case conflicts with Third District's opinion in J.D. v. State, 553 So. 2d 1317 (Fla. 3d DCA 1989). In J.D., the trial judge denied a motion for mistrial but did not rule upon whether the police officer's testimony commented on the defendant's post arrest silence. The Third District considered the totality of the circumstances and held that the trial judge's actions amounted to a tacit overruling of the objection, thereby actually admitting the offending comment into evidence. J.D., 553 So. 2d at 1318. The Third District accordingly found that the trial judge had considered the offending comment, along with the other evidence presented at trial, in rendering the verdict. The court, citing State v. DiGuilio, 491 So. 2d 1129

(Fla. 1986), made it clear that if there had been evidence "from the record" that the introduction of the complained of comment did not, beyond a reasonable doubt, contribute to the adjudication of delinquency, they would have considered the admission of the comment to be harmless.

Petitioner relies on J.D., for the proposition that the Third District has abrogated the presumption, and instead, now applies the DiGuilio harmless error test irrespective of whether the error arises in a jury or a bench trial. However, the Third District's opinion in J.D. appears to be an anomoly. In fact, five years after J.D. was issued, the Third District relied on the presumption to deny a defendant any relief on appeal, thus effectively overruling its prior decision in J.D. See Daniels v. State, 634 So. 2d 187 (Fla. 3d DCA 1994). In Daniels, a case not cited by Petitioner, the prosecutor referred to collateral crimes evidence during opening statements. That evidence was subsequently ruled inadmissible by trial court. Id. at 189-90. The Third District reiterated the rule previously rejected in J.D., that "where a trial judge sitting as a fact finder 'erroneously admits evidence, he is presumed to have disregarded the evidence, and the error of its admission is deemed harmless.' This presumption is overcome only if the record discloses that the trial judge relied upon the erroneous evidence." Id. at 190 (quoting State v. Arroyo, 422 So. 2d at 51). The Third District examined the record and held that

"the defendants have failed to overcome the presumption that the court's verdict was based solely upon admissible evidence." Id. at 191. (citing Arroyo, 422 So. 2d at 51). The Court did not discuss, nor did it cite to, its prior opinion in J.D.

Thus, the Third District has effectively receded from its opinion in J.D., and now applies the presumption in bench trials. This application is consistent with the position taken by all of the other District Courts of Appeal. As a result, the decision of the Fourth District is not in conflict with the decisional law of the Third District and the State suggests that jurisdiction on this ground has been improvidently granted.

In support of his argument that the same standard should be applied in both bench and jury trials, Petitioner contends that requiring a defendant to demonstrate that an error contributed to the trial court's verdict in a bench trial is virtually impossible. Petitioner goes on to make the bald claim that "it would appear to defy logic and common sense to presume that a trial judge, sitting as the trier of fact, disregards any erroneously admitted evidence," and insists that the presumption should be to the contrary (Initial Brief at p. 9). Such a suggestion, however, undermines the very public policy considerations behind the presumption. In order for our criminal justice system to operate efficiently, it must be assumed that in a bench trial the judge will not be influenced by irrelevant or prejudicial evidence.

As discussed more fully above, this assumption can be negated in particular instances by showing that a judge was improperly influenced. There is no such showing in this case.

Petitioner invites this Court to disregard a trial judge's special training and experience for purposes of making the analysis whether the introduction of contested evidence is harmless. However, it is readily apparent, and has long been understood so, that, by virtue of a judge's training and experience, a judge will be in a better position to disregard the introduction of contested evidence than a juror and layman. As this Court noted in Prince v. Aucilla River Naval Stores Co., 137 So. 886 (Fla. 1931), it is significant in cases of erroneous admission of evidence that a case is tried before a judge not a jury, "where irrelevant or immaterial testimony may sometimes be highly prejudicial to a fair consideration of the facts by untrained minds of jurors who might thereby be misled into rendering a verdict on testimony which should have little or no consideration as of evidentiary value."

This Court reaffirmed this belief in First Atlantic Nat. Bank of Daytona Beach v. Cobbett, 82 So. 2d 870, 871-872 (Fla. 1955), saying "[i]n cases tried by the Judge without a jury the Judge is in a position to evaluate the testimony and discard that which is improper or which has little or no evidentiary value. . . . We do not find that the evidence objected to injuriously or harmfully affected appellant

when considered and evaluated by an experienced trial Judge." See also Adan v. State, 453 So. 2d 1195, 1197 n.1 (Fla. 3d DCA 1984). It is for these reasons, and others, that so many courts have acknowledged the presumption that a trial judge is presumed to rest his verdict on admissible evidence and to disregard the inadmissible. State v. Arroyo, 422 So. 2d at 51; United States v. McCarthy, 470 F.2d at 224 (and cases cited therein); see also United States v. Masri, 547 F.2d 932, 936 (5th Cir. 1977) (and cases cited therein).

Application of this rule does not offend this Court's pronouncement in Goodwin v. State, 751 So. 2d 537 (Fla. 2000), and DiGuilio requiring the State, as the beneficiary of error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. This Court reiterated in Goodwin that the harmless error analysis focuses on the effect of the error on **the trier of fact**. Id. at 542 (citing State v. Lee, 531 So. 2d 133, 137 (Fla. 1988)). This Court went on to reiterate that it has inherent authority "to determine when an error is harmless and the analysis to be used in making the determination." Id. at 546 (citing Lee, 531 So. 2d at 136, n.1).

This Court, even after Goodwin, has aligned itself with other appellate courts that recognize the longstanding principle that a trial judge is presumed to have disregarded the inadmissible evidence. See Guzman v. State, 868 So. 2d at

511. In Guzman, the defendant's claim was before this Court on the appeal of a denial of his 3.850 claims. One of those claims was that the prosecutor at trial engaged in misconduct by eliciting testimony about a prosecution witness' polygraph examination and about his own collateral crime of drug possession. Id. at 510. This Court first rejected the claim on the basis of procedural bar, finding that it could have and should have been raised on direct appeal. Id. This Court then denied the claim on its merits, stating importantly as follows:

> If considered on the merits, these claims fail because Guzman's trial was a nonjury trial, and the judge as finder of fact is presumed to have disregarded any inadmissible evidence or improper argument. See First Atlantic Nat'l Bank of Daytona Beach v. Cobbett, 82 So.2d 870, 871 (Fla.1955) (stating that a judge trying a case without a jury "is in a position to evaluate the testimony and discard that which is improper or which has little or no evidentiary value"). Even where a judge erroneously admits improper evidence, the judge as factfinder is presumed to disregard it. See, e.g., State v. Arroyo, 422 So.2d 50, 51 (Fla. 3d DCA 1982). Here, the judge did not err, but appropriately excluded inadmissible evidence. Given these evidentiary rulings, the judge a fortiori may be presumed to have disregarded the inadmissible evidence. Therefore, assuming arguendo that the prosecutor's attempts to introduce the evidence were improper, the attempts were harmless.

Id. at 510-11.

Thus, this Court has determined that the trial judge is entitled to the presumption that he/she disregarded the inadmissible evidence. Guzman, 868 So. 2d at 511. The procedure does not conflict with the harmless error analysis

mandated by Goodwin and DiGuilio because it focuses on the effect of the error on the trier of fact, which is the trial judge. Once the presumption is rebutted, the State must then prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. Again, this procedure is consistent with Goodwin and DiGuilio. Thus, by recognizing and applying the presumption in Guzman, this Court has already exercised its inherent authority "to determine when an error is harmless and the analysis to be used in making the determination."

## Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court affirm the decision of the Fourth District Court of Appeal in Petion v. State, 4 So. 3d 83 (Fla. 4th DCA 2009).

Respectfully submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

_____
CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

_____
HEIDI L. BETTENDORF
Assistant Attorney General
Florida Bar No. 0001805
1515 North Flagler Drive
Ninth Floor
West Palm Beach, FL 33401-3432
Tel: (561) 837-5000
Fax: (561) 837-5099
E-Mail: DCAFilings_4th@oag.state.fl.us

Counsel for Respondent

## Certificate Of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Alan T. Lipson, Esquire, Assistant Public Defender, Criminal Justice Building, Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, this ____ day of November, 2009.

_____
HEIDI L. BETTENDORF
Assistant Attorney General

## Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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HEIDI L. BETTENDORF
Assistant Attorney General