

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1055

Lower Tribunal Case No. 3D07-1209

ANTHONY NOTTAGE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The history of the case is set out in Nottage v. State,

supra and is also set out in the Petitioner's jurisdictional brief,
and is hereby adopted.

INTRODUCTION

The Respondent STATE OF FLORIDA requests that this Court exercise its discretion and not grant discretionary review of the Third District Court of Appeal decision in Nottage v. State, 2009 Fla. App. LEXIS 5808 (Fla. 3d DCA 2009). The symbol "A." refers to the lower court opinion set forth in the Petitioner's Appendix, and is followed by the page number of the opinion, or, in the alternative, the above citation refers to the lower court opinion.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretion to accept this case because the Fourth District cases cited by the petitioner are factually dissimilar to the instant case and the instant case applied the standard of review applied by this Court in Thomas v. State, 748 So.2d 970 (Fla. 1999).

ARGUMENT

- I. THIS COURT SHOULD DENY DISCRETIONARY REVIEW BECAUSE THIS CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH TOMLINSON V. STATE, 584 So.2d 43 (Fla. 4th DCA 1991); WASHINGTON V. STATE, 758 So.2d 1148 (Fla. 4th DCA 2000); OR RUBI V. STATE, 592 So.2 630 (Fla. 4th DCA 2007).

The decision of the Third District Court of Appeal in the instant case does not expressly and directly conflict with Tomlinson v. State, 584 So.2d 43 (Fla. 4th DCA 1991); Washington v. State, 758 So.2d 1148 (Fla. 4th DCA 2000); or Rubi v. State, 952 So.2d 630 (Fla. 4th DCA 2007). Any express and direct conflict must appear within the four corners of the cases. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Express and direct conflict does not appear within the four corners of the instant case and the cases cited by the Petitioner.

The decision in this case is different factually from the cases cited by the Petitioner. In Rubi v. State, after an Allen¹ charge was given, the jury sent out a second note explaining that one of the jurors is assuming and speculating on the evidence and is not following the law. The trial court gave another instruction which stated that "You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter." The Fourth District decided that the second note announced a second deadlock and the court's

¹Allen v. United States, 164 U.S. 492 (1896)

charge amounted to coercion and pressured a holdout juror to conform his views to that of his peers. Under these circumstances, the court held that even though the defense counsel did not object to the second instruction, it was fundamental error. It stated that if the totality of the circumstances supports the finding of improper coercion of the jury, then it is fundamental error, and *per se* reversible. Rubi v. State, 952 So.2d at 635.

In Washington v. State, the jury began deliberating at 9:08 a.m. and after lunch at 2:30 p.m. announced a deadlock. The judge withheld an Allen charge which occurred amidst a generally non-coercive atmosphere. A verdict of guilt was reached by 4:00 p.m. The Fourth District stated that analysis of the case is controlled by Thomas v. State, 748 So.2d 970 (Fla. 1999) in which this court stated the well settled principle that a trial court should not couch an instruction to a jury or otherwise act in any way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position. Reviewing the totality of the circumstances to properly address the Allen charge issue, the Fourth District determined that the judge's failure to give an Allen charge was not unconstitutionally coercive and affirmed the convictions for first degree murder and armed

robbery.

In Tomlinson v. State, an Allen charge was given after the jury announced a deadlock after eight hours of deliberation. The same day, unable to reach a unanimous decision, the jury announced a *second* deadlock, and the state agreed to a mistrial, but the defense urged further deliberations. The trial court sent the jury home overnight after giving a *second* deadlock instruction telling them to pray for guidance, suggesting it could take as long as six days to reach a decision. The Fourth District adopted a *per se* approach holding that it was fundamental error for the trial court to send the jury back for deliberations after it announced a *second* deadlock and reversed the first degree murder conviction.

In Thomas v. State, *supra*, this Court held that the “exhausting and pressured circumstances” amounted to a constitutional error which rendered the jury’s verdict unreliable and compelled reversal of a first degree murder conviction. Among the circumstances this Court found to be significant were that the jury began deliberations at 7:00 p.m. on a Saturday evening and deliberated all night until a recess at 4:30 a.m. on Sunday morning. Several times the jury expressed a deadlock. Twice, the judge sent the jury back to deliberate with a modified Allen charge that improperly failed to

include that "important cautionary language in [the] standard instruction stating that the court would declare a mistrial and dismiss the jury if they tried but could not reach a verdict." The judge's instructions improperly informed the jury that the judge "had to do everything he could to have them reach a verdict and to have the matter resolved to avoid having to start from the beginning." Before the 4:30 a.m. recess, the foreman informed the judge that "deliberations had broken down to open hostilities." In addition to the problems with the judge's actual charge to the jury, this Court identified other factors significant to its decision: The judge's promise to the jury at the start of trial that it would not last past Thursday or Friday, together with the other prevailing circumstances, including length of the deliberations, the lateness of the hour, the condition of the jurors, and the jury's disclosure of their numerical split. The jury deliberated for over eight hours until past 4:30 in the morning without respite, during which the jury foreman repeatedly informed the court of the deadlock that resulted in open hostilities among the jurors. In addition to the deadlock and hostilities, the record reflected that some of the jurors actually began to cry and walk off. During the course of the night, the judge requested the jury to continue deliberating on three

different occasions, each time after the jurors had informed him that they were deadlocked. Furthermore, although the jurors requested on several occasions to continue deliberating in the case, this did not occur until after the judge had informed the jury that they would be sequestered overnight. Hence, a jury that had apparently been promised an earlier finish faced the possibility of being sequestered indefinitely. These conditions do not reflect the proper circumstances under which a jury should be deciding a capital punishment case. Washington v. State, 758 So.2d at 1152-1153.

The Petitioner argues that in the instant case the Third District announced a rule of law that conflicts with a rule previously announced by the Fourth District. Wallace v. Dean, 3 So.3d 1035, 1039 (Fla. 2009); Nielson v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960). The petitioner argues that Tomlinson adopted a *per se* rule that once an Allen charge is given to the jury, it is fundamental error for a trial court to send the jury back for further deliberations after it announced a second deadlock. The petitioner also argued that the Fourth District reaffirmed the *per se* rule in Washington v. State which stated that once an Allen charge is given, flexibility is lost and the trial crosses the river of no return, and that as it held in Tomlinson, it is *per se* reversible error to

repeat a deadlock jury instruction and send a jury back for further deliberations after it has announced a second deadlock. The petitioner also argued that Rubi reaffirmed the *per se* rule and held that it is fundamental error for the trial court to repeat a deadlock jury instruction and send a jury back for further deliberations after it has announced a second deadlock.

The Petitioner argues that in this case the Third District acknowledged that the Fourth District adopted a *per se* rule but refused to also adopt the rule, and instead utilized the totality of the circumstances test which Thomas stated. Under these circumstances, the Petitioner submits that this Court should exercise its discretionary jurisdiction to review the instant decision and resolve the conflict generated by the decision and establish the proper rule to be applied in determining whether a mistrial is required when a jury is still deadlocked after receiving an Allen charge.

In the instant case, the Third District declined to adopt, as the Petitioner urged, that an overnight recess alone after an Allen charge, constitutes reversible error. The Third District stated that it believed such a bright-line rule would be in conflict with this Court's decision in Thomas, which stated that the standard of

review was whether, under the totality of the circumstances, the trial court's actions were coercive. See Thomas, 748 So.2d at 976; (A: 9-10). The Third District held that because the trial court gave no further instructions to the jury after the Allen charge or in any way coerced a verdict, the totality of the circumstances surrounding the jury's deliberations did not render the verdict unreliable. (A:11).

It should be noted that the *per se* rule used in the Fourth District's cases of Rubi and Tomlinson was applied in cases that were different factually from the instant case. In both Rubi and Tomlinson the jury sent out a *second* note *after* an Allen charge was read explaining that it was still deadlocked, and a *second* deadlock instruction was given. This is not the case in the instant decision, in which the jury did not send a note after the Allen charge was read stating that it was still deadlocked. The second note, which came 55 minutes after the Allen charge was read, merely indicated that "We are still five to one, all the way down" but did not state that they were actually deadlocked.² The court did not give a second Allen

²The Third District stated that the jury's unsolicited disclosure of its numerical divisions was not requested by the trial court who did not admonish the jury at the outset of deliberations not to disclose the voting results. The Third District stated that the better practice, as this Court reiterated in Thomas, is "for the trial judge

charge. Rather, at that point the jury retired to their homes and when they returned the next morning, they reached a decision and found the defendant guilty.

Under these circumstances, the Respondent submits that this Court should not exercise its discretionary jurisdiction because the Fourth District cases cited by the Petitioner are factually different from the instant case which applied the standard of review announced by this Court in Thomas that whether, under the totality of the circumstances, the trial court's actions were coercive.

CONCLUSION

Based on the foregoing authorities and arguments, the Respondent State of Florida respectfully requests that this Honorable Court exercise its discretion and decline to accept jurisdiction in this case.

Respectfully submitted,

BILL McCOLLUM
Attorney General

to admonish the jury at the outset of deliberations that they should not indicate how they stand during deliberations." However, the Third District stated that although no such admonishment occurred here, the trial court gave no further instructions to the jury after the Allen charge or in any way coerced a verdict. (A-11).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed this 15th day of July, 2009 to Assistant Public Defender Howard J. Blumberg, 1320 N.W. 14th Street, Miami, Florida 33125.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with the font standards required by Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and is submitted in Courier New 12-point font.

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