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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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CASE NO. 68,213

DANNY MICHAEL TAYLOR,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS
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TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	
IT IS ERROR TO ALLOW A JURY TO SEPARATE AFTER THEY HAVE BEGUN TO DELIBERATE.	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Cain v. State</u> 462 So.2d 586 (Fla. 2d DCA 1985)	4
<u>Durano v. State</u> 262 Sol.2d 733 (Fla. 3d DCA 1972)	5
<u>Engle v. Florida</u> 476 U.S. 1704 (1984)	5
<u>Engle v. State</u> 438 So.2d 803 (Fla. 1983), <u>cert. denied</u>	5
<u>Franklin v. State</u> 472 So.2d 1303 (Fla. 1st DCA 1985)	5
<u>Livingston v. State</u> 458 So.2d 235 (Fla. 1984)	4,5
<u>Raines v. State</u> 65 So.2d 558 (Fla. 1958)	5
 <u>OTHER AUTHORITIES:</u>	
Rule 3.370, Florida Rule of Criminal Procedure	4

STATEMENT OF THE CASE AND FACTS

Petitioner, DANNY MICHAEL TAYLOR, was charged by information with attempted robbery (R184). The charge was the result of an attempted purse snatching. Appellant was tried on March 19 and 20, 1985 in the Circuit Court for Orange County (R5-177).

The issue involved in this cause arose when defense counsel objected to the jury being allowed to go home after they had begun deliberations (R167). The court allowed the jurors to split up, go home and reconvene in the morning (R170-171). Before the jurors separated, the trial judge instructed the jury as follows:

Over the evening hours, let me remind you that you are not to discuss this case with anyone. You are not to form or fix any opinions about the outcome of the case until you have concluded your discussions and deliberations, so don't discuss the case with family members or friends. (R171)

The record does not indicate that the jurors were questioned on this point when they returned in the morning. The jury found Petitioner guilty as charged (R173).

The Fifth District Court of Appeal held, that a court may permit a jury to go home after it has commenced deliberation in a non-capital case. The court certified the following question to be of great public importance:

After submission of the cause to the jury for deliberations in the trial of a non-capital case, is it

reversible error per se for a trial court to authorize the jury to separate overnight, or for some other definite time fixed by the court, and then reassemble and continue its consideration of a verdict?

Taylor v. State, 11 FLW 211 (Fla. 5th DCA January 11, 1986).

SUMMARY OF THE ARGUMENT

The trial court allowed the jury to separate after deliberation had begun. This violates Florida case law and deprives Petitioner of fundamental fair trial rights. The Court of Appeal affirmed the trial court but certified the question.

POINT

IT IS ERROR TO ALLOW A JURY TO SEPARATE
AFTER THEY HAVE BEGUN TO DELIBERATE.

ARGUMENT

The rule of criminal procedure dealing with separation of jurors (Florida Rule of Criminal Procedure 3.370) does not provide much guidance on the issue:

(a) Regulation of Jury. After the jurors have been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequestered.

(b) Separation after Submission of Cause. Unless the jurors have been kept together during the trial the court may, after the final submission of the cause, order that the jurors may separate for a definite time to be fixed by the court and then reconvene in the courtroom before retiring for consideration of their verdict.

This rule does not deal specifically with separation of the jury after deliberations have begun. This court has held that, in capital cases, separation of the jury after commencement of deliberations is improper and grounds for mistrial. Livingston v. State, 458 So.2d 235 (Fla. 1984). In one post-Livingston decision involving a non-capital case, Cain v. State, 462 So.2d 586 (Fla. 2d DCA 1985), the appellant's conviction was reversed on other grounds, but the court noted that the jury separation issue had possible merit.

The cases cited by the Court of Appeal in their opinion

in this case are easily distinguishable from the case at bar. Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied; Engle v. Florida, 476 U.S. 1704 (1984), was a capital case decided before Livingston. Franklin v. State, 472 So.2d 1303 (Fla. 1st DCA 1985), held that separation during deliberation was not error where the defense attorney made no objection. In the case at bar defense counsel did object to the separation. It is established that a jury should be free from outside influences and distractions while deliberating, and if a jury is not protected from such influences a defendant is denied fundamental rights. See Raines v. State, 65 So.2d 558 (Fla. 1958); Durano v. State, 262 So.2d 733 (Fla. 3d DCA 1972).

Admittedly, the crime involved in the case at bar is not one likely to attract the notice of the media. The likelihood of improper interference still exists since the jurors had already been deliberating for one hour and forty-six minutes when they separated and were sent home. They were then in contact with family and friends, who even unintentionally could have influenced the thoughts of the jurors.

By denying Petitioner's objections and allowing the jury to separate while deliberating the trial court created a probability that the jurors would be improperly influenced.

Petitioner urges this Court to answer the certified question affirmatively, and remand this case to the Circuit Court for retrial.

CONCLUSION

BASED UPON the arguments made and authorities cited herein, Petitioner asks this Honorable Court to reverse Petitioner's conviction and remand this cause to Circuit Court of Orange County for retrial.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Danny Michael Taylor, 4419 Edgemoor Street, Orlando, Florida 32811, on this 20th day of February, 1986.

Kenneth Witts

KENNETH WITTS
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