

IN THE SUPREME COURT OF FLORIDA

CASE NO: 74, 676

RONALD TUCKER,
Petitioner,

vs

THE STATE OF FLORIDA,
Respondent.

FILED
CLERK OF COURT
MAY 19 1974
TALLAHASSEE, FLORIDA
[Handwritten signature]

APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR BROWARD COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JOHN LIPINSKI, ESQ.
P.O. BOX 97-0679
Miami, Florida 33197-0679
(305) 253-7557
Counsel For Petitioner

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3-5
QUESTION PRESENTED	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	
Can A Defendant, Represented By Counsel, Orally Waive A Jury Trial, If A Full Explanation Of The Consequences Is Given By The Trial Judge?	8-10
CONCLUSION	11
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>BURCH V. LOUISIANA</u> 441 US. 130. 99 S. Ct. 1623, 60 L. Ed. 2d 96 (1979)	9
<u>ENRIQUE V. STATE</u> 408 So 2d 635 (Fla. 3d DCA 1981)	9
<u>JONES V. STATE</u> 452 So 2d 643 (Fla. 4th DCA 1984)	8
<u>SHULER V. STATE</u> 463So 2d 464 (Fla. 2d DCA 1985)	9
<u>WILLIAMS V. STATE</u> 521 So 2d 268 (Fla. 2d DCA 1988)	9

INTRODUCTION

The appellant was the respondent and the appellee was the prosecution, State of Florida, in the lower court. The parties will be referred to as they stood in the lower court. The record on appeal will be referred to by the letter "R". The trial transcripts will be referred to by the letter "T". All emphasis is added unless otherwise indicated. The decision of the District Court, Fourth District Court of Appeals shall be referred to by the letter "A" and attached as an Appendix to this Brief.

STATEMENT OF THE CASE

The defendant, Ronald Tucker, was charged by information in the lower court with the crimes of:

Armed Kidnapping

Aggravated Battery

Aggravated Assault

(R. 325)

The defendant was tried non-jury (R. 326) and was acquitted of Aggravated Assault (R. 328) and convicted of Armed Kidnapping and Aggravated Battery (R. 329).

The defendant was sentenced to nine (9) years imprisonment on each count, the sentences to run concurrently (R. 330-331).

The defendant/appellant appealed his conviction to the Fourth District Court of Appeals which affirmed his conviction. In affirming his conviction, the District Court certified to this Honorable Court the following question:

Can a Defendant, Represented By Counsel,
Orally Waive A Jury Trial, If A Full
Explanation Of The Consequences Is Given
By The Trial Judge?

(A. I).

This appeal follows.

STATEMENT OF THE FACTS

With regards to the facts concerning the question which was Certified to this Court, the facts are:

The question as to the defendant's waiver of a jury trial came before the trial court on February 22, 1988. At that time the following proceedings occurred.

Thereupon, the following proceedings were had:

THE COURT: Tucker and Ringeman?

MR. FLYNN: That is where she wants to waive jury. As long as Your Honor makes the Defendant fully aware precisely what they are waiving. I note that one counsel is representing two Defendants in this matter. I want to have it discerned on the record there is no conflict. I will waive jury assuming there is appropriate colloquy in terms of the Defendants' rights. That they be fully presented to them so they are well aware of what they are giving up in a jury trial. I will have no objections.

MS. BROWN: I have discussed this with them. Let's do it formerly on the record.

THE COURT: For Tucker or--

MS. BROWN: For both of them.

Whether there was a question of conflict of interest originally. When I took the case this was discussed with them and none of us find there will be a conflict of interest.

THE COURT: Who is Ringeman and who is Tucker?

MS. BROWN: This is Tucker (indicating) and this is Ringemen (indicating). What we are here for is I have waived jury. That means you all would give up your rights to have your cases heard in front of six people. What that also means is the State Attorney and the Judge wants to know if this is agreeable to you that just one person, namely the Judge, hears the evidence.

THE COURT: Mr. Tucker is right here? And Mr. Ringeman is right there.

Gentlemen, your counsel has explained what a non-jury trial means to you; however, I want to make sure that you fully understand that when you were arraigned in this case you entered a plea of not guilty requesting a trial before jury. That was your right at that time. You could have had a jury trial. You could have asked your attorney to come in here and pick six people from the community to hear your case which you would not have in a non-jury trial.

The State, of course, had a right to then make a formal decision if you decided you did not want a jury trial; that you were agreeable for going to a non-jury trial.

Your lawyer is correct if the State is willing to let the case be tried before me as a Judge without a jury being present to listen to the evidence. In that case it will be the Judge who will determine any issues of fact in the case as well as any questions of law.

I want to make sure if you agree to going non-jury that you do so voluntarily and should there be a finding of guilt in this case that either one of you will not, thereafter, come in here and comment that it was done because you did not have a jury or if you

had had a jury that the verdict would have been otherwise.

It is your privilege, it is your choice. I will ask you, directly, Mr. Ringeman, do you wish to proceed to trial before a Judge and without a jury? Yes or no?

MR. RINGEMAN: Yes, sir.

THE COURT: To you.

MR. TUCKER: Yes, sir.

THE COURT: Mr. Tucker, also, the same question to you. Are you willing to proceed without a jury?

MR. TUCKER: Yes.

THE COURT: You are willing to let the Judge make the decision to the questions of facts as well as the issues of law?

MR. RINGEMAN: Yes.

MR. TUCKER: Yes.

THE COURT: Mr. Flynn, we cannot go any further than that.

MR. FLYNN: That being the case, the Defendants being fully advised of their rights and facts that they are co-defendant on this one trial I see nothing further to admonish them on. The State will accept the defense motion to go by way of bench trial.

THE COURT: Off the record.

(Whereupon, an off the record discussion was held).

THE COURT: All right. At this time therefore the Court will allow the motion to waive the jury in the case.

There does that bring it?

(SR. 2-5).

This appeal follows.

QUESTION PRESENTED

Can A Defendant, Represented
By Counsel, Orally Waive A
Jury Trial, If A Full Explanation
Of The Consequences Is Given By
The Trial Judge?

SUMMARY OF THE ARGUMENT

The Petitioner's waiver of jury trial was invalid as it was neither in writing nor given subsequent to being advised as to the consequences of such a waiver.

ARGUMENT

Can A Defendant, Represented
By Counsel, Orally Waive A
Jury Trial, If A Full Explanation
Of The Consequences Is Given By
The Trial Judge?

There is no question that in this case a written waiver of jury trial was not filed. The questions before this Court concern whether a written waiver is necessary and, if a written waiver is not necessary, what must be covered/reflected in an oral waiver for the oral waiver to be valid.

There can be no question that the Right to a Trial by Jury is one of the most valuable rights that any criminal defendant has.

Rule 3.260, F.R.Cr.P., provides that:

A defendant may in writing waive a jury trial with the consent of the state.

This is the only provision of the Florida Rules of Criminal Procedure as to the waiver of a jury trial and it requires such waiver to be in writing. See, Jones v. State, 452 So 2d 643 (Fla. 4th DCA 1984), at p. 645. By requiring that the waiver of this valuable right be made in writing, the Rule requires that a defendant at least consider, to the extent he must read the waiver and sign it, as he signs away that right (if he does indeed relinquish it) the extent of that right and what he may be giving up. The law cannot force a defendant to give due consideration to the relinquishment of a valuable constitutional right, but the requirement of Rule 3.260, F.R.Cr.P., that such waiver be in writing, ensures that the

law and courts, by this rule, have done everything within their power to focus the attention of a defendant (and hopefully his counsel) upon the value of a jury trial and what the defendant is giving up by relinquishing that valuable constitutional right. The premise that the more valuable something is, such as the instant constitutional right, the more difficult it should be to voluntarily lose it, is adequately reflected in the clear precise requirement that such waiver be in writing. That requirement should be upheld.

Even if this Court should find that Rule 3.260, F.R. Cr.P., be somehow interpreted to include an oral waiver, the Petitioner submits that any such waiver, to be valid, must be knowingly, intelligently and voluntarily made. See, Shuler v. State, 463 So 2d 464 (Fla. 2d DCA 1985); Williams v. State, 521 So 2d 268 (Fla. 2d DCA 1988); Enrique v. State, 408 So 2d 635 (Fla. 3d DCA 1981). The Petitioner submits that unless he, or any defendant, is informed what are the consequences of a waiver of jury trial, then that criminal defendant cannot be said to have knowingly, intelligently and voluntarily waived that constitutional right. In the case of Enrique v. State, supra, the Court, found that "there is not the slightest indication that he was possessed of any more information respecting the meaning of jury trial than that provided by the court". However, that meager information did not, for example, tell the defendant that he could participate in the selection of the jury or that any jury verdict must be unanimous. See, Burch v. Louisiana, 441 US.130, 99 S. Ct. 1623, 60 L.Ed.2d 96 (1979). Without such minimal information the defendant could not possibly have understood the consequences

of waiving jury trial, and that waiver could not be knowing and intelligent.

(p.637).

In this case, the state attorney himself was concerned about the validity of the waiver stating:

I will waive jury assuming there is appropriate colloquy in terms of the defendant's rights. That they be fully presented to them so they are well aware of what they are giving up in a jury trial.

(SR. 2).

Despite the state's fears, the only explanation as to what is meant by a jury trial which was given to the defendant was the statement by the trial court that:

You could have had a jury trial. You could have asked your attorney to come in here and pick six people from the Community to hear your case which you would not have in a non-jury trial.

(SR. 3)

The defendant was not informed, by anyone, that he could participate in the selection of the jury or that any jury verdict must be unanimous. The Petitioner would contend, as did the Enrique court, that such minimal information is essential to a valid waiver of a jury trial. The Petitioner would contend that when the only information a defendant is given is that "your attorney could pick six people from the community" to hear his/her case, the waiver of the Right to Trial by Jury cannot be said to have been knowingly, intelligently and voluntarily given.