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Abstract

The Florida Constitution1 confers a quasi-legislative role upon the Supreme Court of Florida authorizing it to adopt uniform practice and procedural rules applicable to the state's courts.

KEYWORDS: error, reversible, harmless

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Introduction

The Florida Constitution[1] confers a quasi-legislative role upon the Supreme Court of Florida authorizing it to adopt uniform practice and procedural rules applicable to the state's courts. Pursuant to this power the Florida Rules of Criminal Procedure were adopted in 1967 in order "to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration."[2] However, in some instances the rules have failed to promote the requisite simplicity: Rule 3.390(a)[3] is an example of a judicial rule which does not effectuate such simplicity. This tenet's application, both in its original and amended version, has caused confusion as is made apparent by judicial misinterpretations in the lower courts.

In essence, Rule 3.390(a) established the right of either party to have the jury instructed on the maximum and minimum sentence which could be imposed with an adjudication of guilt. Controversy arose concerning the semantic interpretation given the language of the rule. Was the requirement that the judge on request instruct the jury directory or mandatory? Further, if instruction giving is mandatory, does its omission constitute reversible or harmless error? This note addresses these questions. First the rule's history and purpose will be examined. Later, developing caselaw and legal analysis will be described to illustrate its application in Florida's courts.

1. Article V, section 3 of the Florida Constitution was adopted November 6, 1956 in a general election. It states, "[t]he practice and procedure in all courts shall be governed by rules adopted by the Supreme Court." Fla. Const. art. V, § 3.

2. FLA. R. CRIM. P. 3.020.

3. The original and amended versions will be given in their chronological development later in the text.

Historical Perspective

In order to fully comprehend both the scope and implications of the minimum-maximum sentencing rule, a historical viewpoint illustrating the development of the rule is imperative. Prior to granting the Florida Supreme Court authority to codify rules of procedure, the legislature enacted statutes specifying such procedural guidelines. Many of these statutes, including Rule 3.390(a) evolved into specific Florida Rules of Criminal Procedure.[4] When the Florida State Legislature enacted The Criminal Procedure Act,[5] in 1939, Statute 918.10[6] (entitled "Charge to Jury") Section (1) provided, "[t]he presiding judge shall charge the jury only upon the law of the case at the conclusion of the argument of counsel."[7] The statute was amended in 1945, adding, "and must include in said charge the penalties fixed by law for the offenses for which the accused is then on trial."[8]

The Supreme Court of Florida first interpreted the statute in *Simmons v. State.*[9] The basis for the appeal was the judge's failure to charge the jury as required by Florida Statute 918.10. The court recognized uncertainty in the statutory language: it was unclear whether the charge was mandatory or directory. In deciding the issue, the court relied strongly on the general premise that the jury's sole function is to determine issues of fact and apply the appropriate law in rendering its decision. Contrarily, the court's function is to instruct the jury on the law pertinent to the factual situation. "[I]f the court is required to depart from this course and discuss matters having no bearing on the true function of the jury, the trial necessarily is disconcerted and impeded."[10]

4. In fact, as Albert Datz noted in 1968, "most of the rules are patterned after statutes which were in existence at the time the rules were adopted; and in many instances the statutes were lifted verbatim and placed into rules." Datz, *Rules of Criminal Procedure,* 42 FLA. B.J. 285 (1968).

5. The Criminal Procedure Act became effective October 19, 1939. The criminal courts were then governed with a uniform procedural act until the adoption of the Florida Rules of Criminal Procedure.

6. 1940 Fla. Laws 239 (1940).

7. *Id.*

8. 1945 Fla. Laws 239 as amended by FLA. STAT. § 918.10 (1969).

9. 160 Fla. 626, 36 So. 2d 207 (1948).

10. *Id.* at _, 36 So. 2d at 208.

The supreme court also scrutinized the constitutionality of the statute, focusing on the separation of powers doctrine. In the court's view the enactment attempted to mandate a new procedural role for the courts by altering their discretionary authority to instruct the jury. The court conceded that while the legislature has the power to establish guidelines in procedural areas, primary judicial power and discretion cannot be hindered by legislative regulation.

The *Simmons* opinion seemed to suggest the rule was unconstitutional, yet the court avoided direct pronouncement on this question. Taking a different route, the court construed the rule in a light designed to prevent constitutionally fatal ambiguity and applied a saving judicial gloss:

> It will be observed that statute 918.10, in directing the court to charge upon the penalty, uses the word "must", rather than "may". If the statute be interpreted as an unqualified mandate that the court in every criminal case include in the charge the penalty which might be imposed, rather than a mere grant of the privilege to so charge, it becomes an unreasonable infringement of the inherent power of the court to perform the judicial function because it burdens the court with doing an empty and meaningless act.[11]

The court reasoned that the legislature is presumed to intend constitutional enactments. Thus the legislature must have intended the trial judge to retain discretion in using the additional charge. To this end, the court further concluded that "shall" in legislative enactments usually connotes a "grant of authority" which is subject to limitations of power. Through the interpretation of the words "must" and "shall"[12]

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11. *Id.*

12. The problem with defining 'shall' and 'must' is that the courts across the nation have placed different interpretations on the meaning of the words depending upon the context. Some courts interpret 'shall' to be mandatory. Swift v. Smith, 110 Colo. 126, 201 P.2d 609, 614 (1948); Brown v. Hecht Co., 137 F.2d 689, 692 (D.C. Cir. 1943); State v. Bradley, 147 Ga. App. 569, 249 S.E.2d 365, 366 (1978). Others agree with the Florida Supreme Court and assert that it depends on the construction of the statute. Wirlis v. Seeley, 33 Ohio Op. 287, 68 N.E.2d 484, 485 (1946); Faunce v. Carter, 26 Wash. 2d 219, 173 P.2d 526, 528 (1946); Barkely v. Pool, 102 Neb. 799, 169 N.W. 730, 732 (1918); In Re Dupont Borough Wards, 36 Pa. Commw. Ct. 504, 387 A.2d 1367, 1369 (1978).

to mean "may,"[13] the court determined that the statute should be applied in a discretionary, not mandatory, manner.

Adoption of the Florida Rule of Criminal Procedure 3.390(a)

When the Supreme Court of Florida adopted the Florida Rules of Criminal Procedure in 1967, Section 918.10(1)[14] of the Florida Statutes became Rule 3.390(a).[15] Since the wording of this statute did not clearly indicate whether the rule was mandatory or directory the *Simmons* rational appeared dispositive. Nevertheless, the point became multilitigous.

In 1974, the Supreme Court of Florida interpreted the new rule in *Johnson v. State*.[16] The defendant had been convicted of second degree murder. The defense counsel requested in writing that the judge instruct the jury on the maximum penalties, which the judge refused. The Second District Court of Appeal affirmed the lower court denial by relying upon the *Simmons* rationale that the rule was directory rather than mandatory. The supreme court explained the distinction stating, "[i]f the requirements of the rule are mandatory, it must be complied with by the trial judge; if, however, such language is directory only, the granting or denying of a request for such instruction would rest within the sound discretion of the trial judge."[17] In its affirmance the court relied primarily on the argument that because sentencing was not a

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'Must' also has been construed as mandatory. State v. Reese, 365 Mo. 1221, 274 S.W.2d 304, 308 (1954). However, the majority of the courts have interpreted in context. In Re Atkins Estate, 121 Cal. App. 251, 8 P.2d 1052, 1054 (1932); Robinson v. City of Saginaw, 267 Mich. 557, 255 N.W. 296 (1934).

13. The court's interpretation of "shall" as "may" is a direct contradiction to the 1977 amendment interpretation. *See* note 27.

14. Section 918.10 had been slightly reworded to state that "[a]t the conclusion of argument of counsel the court shall charge the jury. The charge shall be only on the law of the case and must include the penalty for the offense for which the accused is being charged." FLA. STAT. § 918.10(1) (1967). Interestingly, the legislature did not repeal this statute when the Florida Rules of Criminal Procedure were adopted.

15. FLA. R. CRIM. P. *Jury Instructions* 3.390(a) provides: "The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel, and must include in said charge the penalty fixed by law for the offense for which the accused is then on trial."

16. 308 So. 2d 38 (Fla. 1974).

17. *Id.* at 39.

jury function it was not the trial court's function to give instructions on penalties to be imposed. Bolstering its rationale, the court pointed to the consistency of their *Simmons* and *Johnson* decisions with Florida's Standard Jury Instruction:

> [T]he language of Standard Jury Instructions in Criminal Cases 2.14 (as validated by Rule 3.985 of the Florida Rules of Criminal Procedure) which instructs the jury that it is not to be concerned with the imposition of any penalty if it reaches a verdict of guilty, except as it may be connected with a recommendation of mercy.[18]

However, in using the *Simmons* decision as a precedent, the *Johnson* court in essence contradicted itself. In *Simmons*, interpretation of the statute was overshadowed by the possible violation of the separation of powers doctrine. Avoiding the constitutional issue, that court interpreted the statute broadly in order to alleviate its potential interference with judicial responsibilities. But in 1967, when the supreme court adopted the the identical language of the statute into Rule 3.390(a), it obviated any claim of legislative interference. Therefore, "the decision amounted to a *de facto* amendment of the rule by substituting 'may' for 'must'."[19] The courts continued to follow this interpretation until the 1977 amendment.

1977 Amendment to Rule 3.390(a)

In 1977, Rule 3.390(a) was amended[20] as follows:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the judge shall include in said charge maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial.[21]

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18. *Id.* at 40.

19. Yetter, *The Florida Rules of Criminal Procedure: 1977 Amendments,* 5 FLA. ST. U.L. REV. 243, 302 (1977).

20. The Fla. Bar. Re Fla. Rules of Crim. Proc., 343 So. 2d 1247, 1261 (Fla. 1977).

21. *Id.*

Due to the altered language of the 1977 amendment lower courts were uncertain of its interpretation. Since the previous rule had not been construed by its plain meaning it was unclear which direction the supreme court would pursue. In other words, what did "shall"[22] mean?

The district courts' interpretations of the new rule followed contradictory patterns of logic as illustrated in two leading cases, *Tascano v. State*[23] and *Murray v. State*.[24] The First District Court of Appeal, in *Tascano,* stated "in light of the previous judicial decisions construing the term 'must' as 'may', we are hesitant to conclude that the rule, by use of the term 'shall', means what it says and is accordingly mandatory."[25] The court then held that the rule was discretionary and not mandatory even though "shall" is mandatory language. In 1980, the Fifth District Court of Appeal decided *Murray,* which differed from the semantic interpretation given "shall" in *Tascano.* The *Murray* court felt that a change in the language signalled that the interpretation had been altered, and therefore concluded that "shall" was meant to be mandatory, as indicated in Webster's New Collegiate Dictionary.[26] Although this interpretation was at variance with *Tascano,* it did little to alter the outcome. The court invalidated the mandatory language utilizing instead the *Johnson* rationale that the Florida Standard Jury Instruction 2.15[27] required the jury to disregard penalty in determining guilt or innocence. Thus, the court concluded, a judge's

22. "Shall" has been interpreted by Florida courts to have a mandatory meaning. Holloway v. State, 342 So. 2d 966 (Fla. 1977); Neal v. Bryant, 149 So. 2d 529 (Fla. 1962); J.W.H. v. State, 345 So. 2d 871 (Fla. 1st Dist. Ct. App. 1977).

23. 363 So. 2d 405 (Fla. 1st Dist. Ct. App. 1978).

24. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).

25. *Id.* at 407.

26. *Id.* at 112.

27. Fla. Std. Jury Instr. (Crim.) 210(a) provides:

> (A) You are to disregard the consequences of your verdict. You are impaneled and sworn only to find a verdict based upon the law and the evidence. You are to consider only the testimony which you have heard (along with other evidence which has been received) and the law as given to you by the court.
>
> You are to lay aside any personal feeling you may have in favor of, or against, the state and in favor of, or against, the defendant. It is only human to have personal feeling or sympathy in matters of this kind, but any such personal feeling or sympathy has no place in the consideration of your verdict. When you have determined the guilt, or innocence, of the

failure to adhere to the literal language of Rule 3.390(a) cannot be reversible error, for it is illogical to reverse a conviction "upon the basis that the jury was not afforded information which it was then obligated to disregard."[28] If courts were required to follow such contradictory principles it would be "suggestive of a Lewis Carroll fantasy flight back and forth through the legal looking glass."[29] Therefore, even if the statute is mandatory, it loses much of its strength since failure to comply does not warrant reversal.

Subsequently, the Supreme Court of Florida reviewed *Tascano.*[30] The court decided that if the amendment was to have the prior directory meaning, the 1977 alteration would have been "meaningless and accomplished nothing."[31] Thus, the court concluded that it is mandatory, upon the request of either counsel, to instruct on maximum and minimum sentences which may be imposed. Justice Alderman, in his dissent, agreed with the district court in *Murray* that Rule 3.390(a) was inconsistent with the Florida Standard Jury Instructions.[32] Consistent with the *Murray* rationale he sought to invoke the harmless error doctrine because the instruction required the jury to disregard the mandatory penalty instruction; failure to give this instruction would have no bearing on the determination of guilt. Additionally, Justice Alderman noted that in amending this tenet, no commentary indicated an intent to overrule the *Johnson* decision. The dissent's disdain for the confusion created by the amendment is obvious:

> If a majority of this court intends that, when requested, an instruction on penalties is mandatory, then the court should promulgate a new rule that clearly and directly tells judges and lawyers of this state that the rule is mandatory and not directory.[33]

In deciding *Tascano,* the court declared the decision prospective,[34]

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accused, you have completely fulfilled your solemn obligation under your oath.

28. 378 So. 2d at 112.
29. *Id.*
30. 393 So. 2d 540 (Fla. 1980).
31. *Id.* at 541.
32. *Id.* at 542.
33. *Id.*
34. The court could have made the decision retroactive but decided to make it

and reversed for a new trial. The various state's attorneys disagreed with the decision that the conviction was reversible. In future cases, it was contended, failure to adhere to Rule 3.390(a) would be a harmless error.[35] The various district courts were confronted with the dilemma of whether they should proceed upon the precedent established in *Tascano*[36] or follow the narrow, mandatory interpretation by relying on the rationale in *Murray*.[37] The supreme court ended the dilemma by reviewing the district court's decision in *Murray*. Recognizing the obvious conflict with *Tascano,* the court quashed the *Murray* decision to facilitate consistency. The harmless error doctrine was found inapplicable because, "this mandatory duty could be circumvented on the basis of the harmless error rule, [and] the effects of the mandatory provision in the rule would be negated."[38] To be consistent the court reviewed *Knight v. State*[39] and *Allen v. State,*[40] both of which relied on the appellate decision in *Murray*. The court clarified its position on pending cases when it reaffirmed that "the defendant, as well as all others who have preserved this point on appeal, received the benefit of this interpretation of the rule."[41]

As broad as the rule appears, it is narrowed by the fact that defense counsel must make formal objection in order to preserve the point for appeal.[42] In *Welty v. State*[43] the supreme court continued to con-

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prospective and "applicable to all cases in which a jury trial is commenced on or after the effective date of this opinion." *Id.* at 541.

35. FLA. STAT. § 59.041 (1979) states that:

> No judgement shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

36. *See* Moyers v. State, 400 So. 2d 769 (Fla. 1st Dist. Ct. App. 1981); Wesley v. State, 400 So. 2d 175 (Fla. 1st Dist. Ct. App. 1981).

37. 378 So. 2d 111 (Fla. 5th Dist. Ct. App. 1980).

38. 403 So. 2d 417 (Fla. 1981).

39. 394 So. 2d 997 (Fla. 1981).

40. *Id.*

41. *Id.*

42. FLA. R. CRIM. P. *Jury Instruction* Rule 3.390(a) states:

> No party may assign as error grounds of appeal the giving or the failure to

strict the rule. The defendant argued for reversal since the judge failed to adhere to *Tascano*. The district court refused to reverse:

> On several occasions during the trial the jury was advised that the maximum penalty for murder in the first degree was death and the minimum penalty was life imprisonment. The trial court failure to again advise the jury on what it had already been told was not a reversible error.[44]

The *Welty* decision revealed the court's flexibility in applying Rule 3.390(a). Since the possible penalties were presented to the jury, although not specifically in the instructions, the court refused to reverse a conviction on a technical procedural error.

Perspective

The developing interpretation of Rule 3.390(a) illustrates the court's authoritative power in its quasi-legislative role. Because the court has rejected application of the harmless error doctrine when instruction has been incorrectly withheld, the state has been compelled to retry a convicted defendant in an overworked criminal justice system. Judges and district attorneys are frustrated. As Marc Gorden, an Assistant State Attorney, stated, "[t]here are at least 20 cases in all and at least half a dozen major cases that we've had to rehandle because of a technical error . . . . It's created a substantial problem for us."[45] He also said that the cost to the criminal justice system is hard to determine. In Florida today, with the increasing crime rate, both the cost of criminal justice and popular indignation over protecting a criminal with procedural technicalities, is mounting.

When the court adopted the rule, no commentary rationalized the

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> give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of the presence of the jury.

The court also held that this applies to the *Tascano* decision. Kelly v. State, 389 So. 2d 251 (Fla. 2d Dist. Ct. App. 1980).

43. 402 So. 2d 1159 (Fla. 1981).
44. *Id.* at 1160.
45. Fort Lauderdale News, Dec. 27, 1981, § B, at 1, col. 2.

stringent guidelines. This could be explained by the increasingly difficult task faced by jurors who weigh the factual evidence and apply the complex laws given in jury instructions. Considering the degree of responsibility given jurors, is it not imperative that they understand the gravity of their decision and know that the death sentence, life imprisonment or probation is possible? The gravity of the situation should inspire greater consciousness in jury deliberations.

Alderman, in his dissent in *Tascano,* recognized that the court could have prevented confusion by clearly and explicitly stating the intention of the amendment. He noted that the court failed to adhere to precedent in its interpretation of "must" and "shall."[46] The court's indecision has resulted in a number of cases requiring reversal based on the rule. Alderman's position is supported by the Conference of Circuit Courts which asked the supreme court to reverse the decisions based on the rule. Judge Futch, of Broward County, observing the contradiction in the rule said, "[h]ow can a jury disregard the consequences of a verdict when you tell them the penalties? It's asking too much of the jury to disregard it. They're human too."[47]

Opposition has been unsuccessful in changing the supreme court's costly interpretation of this rule. The tenet has been clearly defined as its guidelines have been explicitly stated for the lower courts. With precedent established, the court in *Welty* indicated that less than strict adherence would suffice. The court will not reverse a lower court's decision on a purely procedural mistake if the lower court complies with the essence of the rule. The outer limits of the court's flexibility remain untested; presently it is clear only that the jury must be fully aware of the possible penalties or the decision will be reversed. It seems ironic that judges, by failing to give requested, written instructions, will generate an otherwise avoidable source of judicial waste.

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46. 393 So. 2d at 541, 542.
47. Fort Lauderdale News, Dec. 27, 1981, § B, at 4, col. 2.