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Criminal Law: Waiver of Right to Review Instructions by Failure to Object at Trial

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CRIMINAL LAW: WAIVER OF RIGHT TO REVIEW INSTRUCTIONS BY FAILURE TO OBJECT AT TRIAL

Hill v. State, 30 So.2d 497 (Fla. 1947)

In the trial of defendant for grand larceny, the state relied wholly on circumstantial evidence. The court failed to instruct the jury as to the applicable law where the state relies entirely on evidence of this nature. Defendant did not object to the omission. After a conviction, he sought to assign the omission as error on appeal.[1] HELD, conviction affirmed without opinion. Justice Buford in a dissenting opinion contended that such an instruction was part of the law of the case, and that the omission was reversible error in spite of defendant's failure to object at the trial.

It has been said that a defendant must make a request for instructions or must object to those given at the trial in order to question on appeal the correctness of a charge,[2] but there are many situations in which an instruction or failure to instruct has been held reviewable even though appellant failed to object at the trial.[3] In giving reasons to justify an exception, some courts talk in terms of the duty of the trial court to give instructions on the general principles of law in point;[4] others say that review is discretionary with the appellate court[5] and that the court may take notice of the error, although the review is not a matter of right.[6] It is often said that the instruction will be reviewed, in spite of defendant's failure to object, where a fundamental or substantial right of the defendant is involved.[7] The courts are more willing to grant review in capital

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[1]Brief for Appellant, p. 10.

[2]*See* Stassi v. United States, 50 F.2d 526, 527 (C. C. A. 8th 1931).

[3]*Reversed for failure to instruct*: People v. Putnam, 20 Cal.2d 885, 129 P.2d 367 (1942); People v. Soldavani, 45 Cal. App.2d 460, 114 P.2d 415 (1941); People v. Heddens, 12 Cal. App.2d 245, 55 P.2d 230 (1936); McKenna v. State, 119 Fla. 576, 161 So. 561 (1934); Perry v. State, 185 Ga. 408, 195 S. E. 175 (1938); State v. Wheeler, 216 Iowa 433, 249 N. W. 162 (1933); Grant v. State, 172 Miss. 309, 160 So. 600 (1935); Commonwealth v. Calvery, 130 Pa. Super. 575, 198 Atl. 450 (1938); Mannill v. Commonwealth, 185 Va. 244, 38 S. E.2d 457 (1946).

Reversed for erroneous instructions: Walker v. United States, 104 F.2d 465 (C. C. A. 4th 1939); States v. Loveless, 39 N. M. 142, 42 P.2d 211 (1935).

[4]People v. Scofield, 203 Cal. 703, 265 Pac. 914 (1928).

[5]Hoppal v. People, 102 Colo. 524, 81 P.2d 381 (1938).

[6]*See* Stassi v. United States, 50 F.2d 526, 531 (C. C. A. 8th 1931).

[7]Comment, 23 MICH. L. REV. 276 (1925).

cases than in cases involving lesser offenses.[8] The decisions denying review are usually based on procedural grounds, whereas the decisions granting review are usually justified on the basis of a special exception to the general rule.[9] The real ground, however, for any such decision to review is the court's own opinion of the evidence and of the justice of the case.[10]

Prior to the adoption of the Criminal Procedure Act of 1939,[11] the Florida Court followed the general rule, making such exceptions as it thought just in each case.[12] Under the provisions of the Act of 1939 the trial judge must charge only upon the law of the case,[13] and no party may assign as error or grounds of appeal the giving or failure to give an instruction, unless he objects thereto before the jury retires.[14] In two cases decided since 1939 the court relied on the statute and refused to review the instruction because of the defendant's failure to object at the trial.[15] However, there is a provision in the Criminal Procedure Act which permits a review where, in the discretion of the court, justice requires it;[16] and in two other recent cases involving a similar question the court granted review without mentioning this latter statute.[17] Thus, the Criminal Procedure Act appears merely to be declaratory of the law as it existed before 1939. The federal courts have reached this conclusion under a similar provision.[18]

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[8]*See* Yarbrough v. State, 206 Ark. 549, 176 S. W.2d 702, 703 (1944).

[9]Note, 54 HARV. L. REV. 1204 (1941).

[10]*Compare* Bennett v. State, 127 Fla. 759, 173 So. 817 (1937), *with* Kimball v. State, 134 Fla. 849, 184 So. 847 (1938).

[11]FLA. STAT. 1941, cc. 901-942.

[12]Kimball v. State, 134 Fla. 849, 184 So. 847 (1938); Bennett v. State, 127 Fla. 759, 173 So. 817 (1937); McKenna v. State, 119 Fla. 576, 161 So. 561 (1934).

[13]FLA. STAT. 1941. §918.10 (1) (Supp. 1945).

[14]FLA. STAT. 1941, §918.10 (4) (Supp. 1945).

[15]Febre v. State, 30 So.2d 367 (Fla. 1947); Simmons v. State, 151 Fla. 778, 10 So.2d 436 (1942).

[16]FLA. STAT. 1941, §924.32, ". . . The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal . . . The court may also in its discretion, if it deems the interests of justice to require, review any other things said or done in the cause which appears in the appeal papers, including instructions to the jury . . ."

[17]Henderson v. State, 155 Fla. 487, 20 So.2d 649 (1945); Harrison v. State, 149 Fla. 365, 5 So.2d 703 (1942).

[18]Rule 30, FED. RULES CR. PROC., 18 U. S. C. A. following §687; *see* Cave v. United

Where the evidence relied upon by the state is wholly circumstantial, the question of whether the defendant is deprived of a fundamental right by a failure of the court on its own motion to give an instruction on the law of circumstantial evidence had not arisen in Florida prior to the present case.[19] Decisions from other jurisdictions are in conflict.[20] Since in this situation discretion is the feature controlling review, it is difficult from the cases to elicit a rule of general application. Nevertheless, it may be assumed that the average juror has sufficiently broad experience in human affairs to recognize circumstantial evidence without having it labelled for him by the court. Judge Learned Hand has stated that a charge on circumstantial evidence serves only ,to confuse the layman into supposing that he should consider circumstantial evidence as different from other testimony.[21] Where a charge on reasonable doubt is given, that charge, in the absence of compelling circumstances to the contrary, should be sufficient.[22] In view of these observations, the omission in the present case of a charge on circumstantial evidence cannot be said to be an injustice or to have deprived the defendant of any fundamental right. The position taken by the majority was the practical solution from the standpoint of efficient administration of justice.

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States, 159 F.2d 464, 469 (C. C. A. 8th 1947).

[19]*But see* Leavine v. State, 109 Fla. 447, 468, 147 So. 897, 905 (1933); Ford v. State, 80 Fla. 781, 782, 86 So. 715, 716 (1920).

[20]*Held, reversible error*: Towler v. State, 44 Ga. App. 262, 161 S. E. 164 (1931); State v. Baker, 208 S. C. 195, 37 S. E.2d 525 (1946); Webb v. State, 140 Tenn. 205, 203 S. W. 955 (1918). *Contra*: Judd v. State, 192 Ark. 1178, 96 S. W. 2d 604 (1936); State v. Hancock, 127 Kan. 510, 274 Pac. 209 (1929); State v. Wyre, 87 S. W.2d 171 (Mo. Sup. 1935); Doerffler v. State, 129 Nebr. 720, 262 N. W. 678 (1935).

[21]*See* United States v. Becker, 62 F.2d 1007, 1010 (C. C. A. 2d 1933).

[22]*Ibid.*