IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 63,571

JOHN H. JAMASON and
JAMES GABBARD,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONERS' BRIEF ON MERITS ON CERTIFIED QUESTION

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PREFACE

The parties will be referred to by their proper names.

The following symbol will be used:

R - Record

STATEMENT OF THE CASE

West Palm Beach Police Chief Jamason and one of his officers, Lt. Gabbard, the petitioners, were adjudged guilty of criminal contempt and each fined $500 for refusing to comply with an oral order of a circuit judge issued over the telephone. They appealed to the Fourth District Court of Appeal, which affirmed but certified the question as being one of great public importance.

STATEMENT OF THE FACTS

The following facts are taken verbatim from the opinion of the Fourth District Court of Appeal:

> . . . On January 18, 1982, at approximately 9:30 a.m., Judge Rosemary Barkett received a telephone call from Steven Gomberg, an attorney in private practice. Attorney Gomberg explained to Judge Barkett that he had been retained by the wife of one John Melody, who was being detained at the West Palm Beach Police Department. Attorney Gomberg stated that appellant Gabbard (a lieutenant with the West Palm Beach Police Department) had refused his request to see John Melody.
>
> Mr. Melody was, in fact, in custody as a suspect in a rape case. He had been advised of his constitutional rights and had made no

request to consult with counsel or to contact anyone.

On the basis of the call from attorney Gomberg, Judge Barkett telephoned appellant Gabbard and stated that she was "issuing an oral writ of habeas corpus to bring John Wayne Melody before me immediately." Appellant Gabbard declined to comply and the judge asked to speak to appellant Jamason (Chief of the West Palm Beach Police Department) who also refused to comply with the oral order. Appellants did not doubt that the person issuing the oral order was Judge Barkett.

At about 12:15 p.m. a formal writ of habeas corpus was served on Major Mann of the West Palm Beach Police Department; however, Melody was no longer in the custody of that Department. He had been transferred to the Palm Beach County Jail for booking. Appellants allege that if Melody had been in their custody at the time the written writ was served, they would have complied with it.

CERTIFIED QUESTION

WHETHER THE WILLFUL REFUSAL TO OBEY A TELEPHONIC ORDER (IN THE NATURE OF A WRIT OF HABEAS CORPUS) ISSUED BY A COURT OF GENERAL JURISDICTION AND BASED UPON AN ORAL APPLICATION THEREFOR BY AN ATTORNEY FOR THE INDIVIDUAL SAID TO BE ILLEGALLY RESTRAINED, MAY CONSTITUTE CRIMINAL CONTEMPT.

ARGUMENT

We recognize that if the lower court had jurisdiction over the parties and the subject matter, then Chief Jamason and Lt. Gabbard should have complied with the telephonic command. If the lower court had no jurisdiction to enter an

oral writ of habeas corpus then the order to bring the prisoner before the court was void and petitioners should not have been held in contempt.

We argued two reasons why the trial court had no jurisdiction, on the first appeal to the Fourth District, which were:

> WHERE A STATUTE PROVIDES THE MANNER IN WHICH RELIEF SUCH AS HABEAS CORPUS IS OBTAINED, THE REQUIREMENTS OF THE STATUTE MUST BE COMPLIED WITH FOR THE COURT TO HAVE JURISDICTION.
>
> WHERE A STATUTE PROVIDES FOR SERVICE OF A WRIT, THE LACK OF SERVICE IS FATAL TO THE COURT'S JURISDICTION AND POWER TO ORDER THE DEFENDANTS TO BRING THE PRISONER BEFORE THE COURT.

Chapter 79 of the Florida Statutes governs habeas corpus. Section 79.01 provides:

> Application and writ--When any person detained in custody, whether charged with a criminal offense or not, applies to the Supreme Court or any justice thereof, or to any district court of appeal or any judge thereof or to any circuit judge for a writ of habeas corpus and shows by affidavit or evidence probable cause to believe that he is detained without lawful authority, the court, justice or judge to whom such application is made shall grant the writ forthwith, against the person in whose custody the applicant is detained and returnable immediately before any of the courts, justices or judges as the writ directs.

Section 79.03 provides that when a writ of habeas

corpus is issued, the writ "shall be served" by the sheriff on the person having custody of the prisoner.

WHERE A STATUTE PROVIDES THE MANNER IN WHICH RELIEF SUCH AS HABEAS CORPUS IS OBTAINED, THE REQUIREMENTS OF THE STATUTE MUST BE COMPLIED WITH FOR THE COURT TO HAVE JURISDICTION.

In the present case there was no "affidavit or evidence" filed with the lower court. The lower court entered its oral writ of habeas corpus based on a telephone call from a lawyer who told the judge that the West Palm Beach police were not allowing him to see a suspect being questioned in regard to a crime. In fact the suspect had been advised of his constitutional rights and had made no request to consult with counsel or to contact anyone (R 30). The lawyer who requested to see him advised them he had been retained by the suspect's wife (R 31). At the point in time that the judge telephoned and orally ordered petitioners to bring the prisoner before the court the suspect was being polygraphed (R 49).

This type of problem had previously arisen and the petitioners, after having had legal advice, had concluded that the court did not have authority to require their compliance with this type of oral order (R 31-34, 56-61). They refused to comply with the oral order in order to bring

this matter to a head and get a ruling from an appellate court. If the appellate court affirmed, then they would of course comply with oral orders of this nature in the future (R 43).

Since it is agreed that everything was done orally by telephone there was obviously no affidavit or evidence as the statute provides. Black's Law Dictionary defines "evidence" as follows:

> Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention....

In the present case there was such a gross departure from the requirements of the statute governing habeas corpus, i.e., an oral writ issued pursuant to an oral request, both by telephone, where the statute requires an affidavit and service of the writ, that the oral order was null and void for lack of jurisdiction.

In 20 Am.Jur.2d, Courts, Section 94, it is stated on page 455:

> The general rule is that a court cannot undertake to adjudicate a controversy on its own motion; it can do this only when the controversy is presented to it by a party, and only

> if it is presented to it in the form of a proper pleading. A court has no power either to investigate facts or to initiate proceedings. Before it may act there must be some appropriate application invoking the judicial power of the court in respect to the matter sought to be litigated. Where a statute prescribed a mode of acquiring jurisdiction, that mode must be followed or the proceedings and resulting judgment will be null and void and the judgment subject to collateral attack. (Emphasis added)

In Lovett v. Lovett, 112 So. 768 (Fla. 1927), this Court stated on page 775:

> "Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power.' Foltz v. St. Louis, etc., R.Co., 60 F. 316, 8 C.C.A. 635. But before this potential jurisdiction of the subject-matter--this power to hear and determine--can be exercised, it must be lawfully invoked and called into action; the parties and the subject-matter of the particular case must be brought before the court in such a way that it acquires the jurisdiction and the power to act. There must be a right in dispute between two or more parties; a proceeding commenced under the proper rules of law; process must be served on the opposite party or parties in order that they may have an opportunity to be heard, or the property, if that be the subject-matter of the action, must be within such jurisdiction, and the owner or person having the right to claim it, or to be heard, must be notified as required by law of the pendency of the proceedings. Brown on Jurisdiction, §§ 2 and 9; 15 C.J. 734, 797. The jurisdiction and power of a court remain at rest until called into action by some suitor; it cannot by its own action institute a proceeding sua sponte. The action of a court must be called into exercise by

> pleading and process, prescribed or recognized by law, procured or obtained by some suitor by filing a declaration, complaint, petition, cross-bill, or in some form requesting the exercise of the power of the court.... (Emphasis added)

See also Coffrin v. Sayles, 175 So. 236 (Fla. 1937).

An analogous situation was present in Crane v. Hayes, 253 So.2d 435 (Fla. 1971), wherein the issue before this Court was whether a trial court has continuing jurisdiction in a habeas corpus proceeding after the entry of final judgment in a case involving child custody. The lower court determined that it had jurisdiction, held a hearing on the merits of child custody and changed custody to the mother. The father did not comply with the order to transfer the child to the mother and was held in contempt. This Court held that the trial court had no jurisdiction to change the custody and the order of contempt was thus void.

In Beverette v. Graham, 132 So. 826 (Fla. 1931), a partition action was instituted and by statute the complaint had to be under oath of the plaintiff. It was not. The defendants failed to appear or answer and final judgment was entered, after which one of the defendants appealed. This Court reversed, stating on page 827:

> ...The chancery court has jurisdiction to hear and determine cases involving the partition of real estate, but 'in order to confer actual

> jurisdiction of the particular case, or subject-matter thereof, the jurisdictional power of the court must be invoked by such measures and in such manner as is required by the local law of the tribunal, and can be invoked only by some method known to the law. Before jurisdiction may be exercised there must be a cause legally before the court, which ordinarily requires its presentation by way of a suit, and not merely by agreement, which suit must be commenced in order to enable the court to take any judicial action in the cause in the manner provided for by the statute creating it.' 17 Std. Ency. of Proc. 674, 675. See also 15 C.J. 729.
>
> The jurisdiction of the court was not invoked in the instant case in the manner required by the statute, inasmuch as the bill of complaint was not sworn to by the complainant, but by her solicitor. The cause was therefore not legally before the court. (Emphasis added)

Florida divorce cases are analogous. The statute requires a period of residence in order to obtain a divorce. Unless the residency requirement is complied with the court has no jurisdiction over the subject matter. Gilbert v. Gilbert, 187 So.2d 49 (Fla. 3d DCA 1966), and Rollins v. Rollins, 19 So.2d 562 (Fla. 1944).

Our research does not reveal any cases in any jurisdiction in which the propriety of an oral writ of habeas corpus was discussed, or where such was ever issued.

There are a number of cases from other jurisdictions which apply the same reasoning as the Florida courts, i.e.,

that where there is a statutory procedure which is not followed, the court lacks jurisdiction and the order or judgment is null and void.

In Kent County Prosecuting Attorney v. Kent County Circuit Judges, 313 N.W.2d 135 (Mich. 1981), the Circuit and District Court Judges issued an order authorizing the sheriff to release inmates from the jail whenever it became overcrowded. In reversing for lack of jurisdiction the court stated on page 136:

> In the instant case, the defendant judges acted collectively in sua sponte manner; no complaints were filed in defendant's courts with regard to the jail conditions by or on behalf of any of the inmates of the facility. Consequently, there was no controversy before the defendants necessitating judicial action. These particular circumstances demonstrate the wisdom of the controversy requirement. Defendant determined, despite the absence of any adverse proceedings, that the jail was in such eminent danger of overcrowding to demand the periodic release of prisoners....
>
> ...Defendant's motive in issuing the order, to ease the perceived threat of jail overcrowing, was certainly a laudable one. Nonetheless, inasmuch as the order was entered absent jurisdiction on the part of defendants it should not stand. (Emphasis added)

If the decision of the Fourth District in the present case is affirmed by this Court, it would mean that a circuit judge could be told over the telephone that the jails are

overcrowded and then by telephone, order the sheriff to release inmates.

In State v. Allaman, 95 N.E.2d 753 (Ohio 1950), the court adjudicated a child to be a dependent child without the formal filing of the complaint against the parent as was required by the statutes. In reversing the order and holding it void for lack of jurisdiction, the court stated on page 757:

> It is a basic requirement that a case cannot be instituted in a court of record without a proper pleading being filed requesting service of summons on those persons who are to be brought within the jurisdiction of the court for the proper disposition of that case.

See also State v. District Court of First Judicial District, 312 P.2d 119 (Mont. 1957).

In State v. Goodman, 406 S.W.2d 121 (Mo. 1966), the court entered an order prohibiting the taking of a deposition of the plaintiff where there was no notice to take the deposition or motion for protective order. In quashing, the court stated on page 126:

> With few exceptions, the forte of any court is to relegate itself to limbo until presented proper pleadings to be employed as vehicles for judicial locomotion. Even in matters over which a court has general jurisdiction, it cannot, ex mero motu, set itself in motion nor have power to determine questions unless they are presented to it in the manner and form prescribed by law. Jurisdiction to decide

> concrete issues in a particular case is limited to those presented by the parties in their pleadings, and anything beyond is coram non judice and void....

See also, Zarges v. Zarges, 455 P.2d 97 (N.M. 1968).

In State ex. rel. Preissler v. Dostert, 260 S.E.2d 279 (W.Va. 1979), the court had entered an order recusing the prosecuting attorney and appointing a special prosecutor where the statutory procedures were not followed. The appellate court reversed, holding that failure to follow the statute was fatal to the court obtaining jurisdiction and the court order was void and a nullity.

In People v. Lewerenz, 192 N.E. 2d 401 (Ill. 1963), judgment was entered in a criminal case, reversed on appeal, and there was an acquittal on a second trial. Defendant then filed a petition for the return of all photographs, fingerprints, and records of identification, serving it on the State Attorney. The court thereupon entered an order directing the Superintendent of Police and the Department of Public Safety to return to the defendant all photographs, fingerprints and other records of identification taken at the time of his arrest. There was a statute which authorized that the Department of Public Safety could be so ordered, but not the police superintendent. The appellate court reversed stating on page 402:

> ...The notice to the State"s Attorney did not confer jurisdiction to enter a valid order against the Superintendent....The judgment order as to the Superintendent is a nullity.

The Fourth District recognized the validity of this argument by stating on page 4 of its decision:

> The first is whether jurisdiction of the subject matter in a habeas corpus proceeding is properly invoked by an oral application. Chapter 79, Florida Statutes (1981), studied in a vacuum, would dictate a negative reply to this inquiry....

The Fourth District went on, however, and stated on page 6:

> Habeas corpus, then, like the unicorn, is a unique animal. Public policy demands that it be readily, speedily and constantly available. The judiciary has been singularly zealous in responding to that policy. Given the history of the great writ in politics as well as in the judicial arena we are inclined to the view that the oral application involved here was sufficient to invoke the court's jurisdiction.

Interestingly enough, the Fourth District did not cite one authority to support its decision that a writ of habeas corpus can be issued on the basis of an oral application, either at common law or under statute, from any jurisdiction. We believe the language quoted by the court on pages 4 and 5 actually supports our view that an application for and a writ of habeas corpus must be in writing. The decisions cited by the Fourth District continually refer to the term "writ". Black's Law Dictionary defines it as "a

precept in writing...." Black defines habeas corpus beginning as follows: "The name given to a variety of writs...."

The Fourth District, after recognizing that Chapter 79, Florida Statutes (1981), requires applications for and writs of habeas corpus to be in writing, then resorted to case law from other jurisdictions and Florida cases preceding the statute. This approach is in direct conflict with Broward v. Broward, 117 So.691 (Fla. 1928), in which this Court stated on page 693:

> General and comprehensive statutes that are designed to regulate an entire subject supersede all common-law rules in the premises, and the valid provisions of the statutes are the controlling law....

The Fourth District said on page 6:

> We are aware of no policy considerations which would lead to a different result. If we bear in mind that all we are concerned with at this juncture is activating the jurisdiction of the court, any parade of horribles picturing an unbridled judiciary seeking omnipotence must be brushed aside. The court has no more power, nor any less, in an action commenced by the spoken as opposed to the written word. The criteria is availability or access to the courts and no other rule suits it so well.
>
> Such a rule, on the other hand, should give the judiciary food for thought. Problems of identity, credibility, reality of interest and even judicial immunity from personal liability may become issues in or consequent upon habeas corpus proceedings instituted

> orally. Such questions will demand the exercise of judicial discretion to a high degree.

We can think of an infinite "parade of horribles" resulting from the holding that the power of a court can be called into action by a telephone call. Will the divorced mother be able to call the judge who will then issue an oral order for the father to bring current delinquent alimony and child support payments? Will temporary injunctions issue by telephone based on the request for injunction by telephone? In essence this was a mandatory injunction in that the court ordered the petitioners to bring the suspect before her.

The Fourth District, on page 3, cited the Federal case of United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), which acknowledges that invalid judicial orders need not be complied with, but the Fourth District relies on the general language in that decision that the power of courts to punish for contempt is necessary for independence of the judiciary. The Fourth District did not cite any Federal cases which would authorize an oral writ based on an oral application and our research reveals none. 28 U.S.C.A. § 2242 provides that an application for writ of habeas corpus "shall be in writing."

The Fourth District relies on its own decision in Sandstrom v. State, 309 So.2d 17 (Fla. 4th DCA 1975) as authority for the enforcement of oral orders. In Sandstrom, however, there was a case pending before the court and that is the important distinction which must not be overlooked here. In the present case there was nothing pending. The proceedings were initiated by a telephone call from a lawyer to a judge and the writ of habeas corpus issued by means of a telephone call to the petitioners.

It is respectfully submitted that actions cannot be initiated by telephone, and defendants cannot be directed to respond, by telephone. There was certainly no overriding social policy present in this case which would justify a gross departure from the statutes and case law. It was stated to the judge by counsel that he was not being allowed to see a suspect. If it ultimately turned out that this violated the suspect's constitutional rights then his confession (if he confessed) could be suppressed. The facts were that he was being given a polygraph examination at the time (R 49) and the results of that are not admissible as evidence in any event.

WHERE A STATUTE PROVIDES FOR SERVICE OF A WRIT, THE LACK OF SERVICE IS FATAL TO THE COURT'S JURISDICTION AND POWER TO ORDER THE DEFENDANTS TO BRING THE PRISONER BEFORE THE COURT.

Section 79.03, Florida Statutes, provides in part:

> Service of Writ.--When issued, the writ shall be served by the sheriff of the county in which the petitioner is alleged to be detained on the officer or other person against whom it is issued, or in his absence from the place where the prisoner is confined, on the person having the immediate custody of the prisoner. ...

In the present case there was obviously no service of the oral writ.

In Nieboer v. T.L., V.H., L.C. and J.P., 394 So.2d 163 (Fla. 1st DCA 1981), a writ of habeas corpus was issued by the court; however, the statutory method for service of process was not followed. In reversing, the court stated on page 164:

> Section 48.111, Florida Statutes, establishes the method for service of process on public agencies, and requires service on the chief executive officer. his provision was not complied with in the present case, and service on the Department was thus ineffective. Without proper service, the court lacked jurisdiction to order the Department's involuntary joinder as a party defendant.... (Emphasis added)

In Bussey v. Legislative Auditing Committee of Legislature, 298 So.2d 219 (Fla. 1st DCA 1974), a copy of the complaint was mailed to the defendant's lawyer and the trial judge found this was sufficient to give the court jurisdiction over the person of the defendant. The First District reversed, stating on page 221:

> ...Where the defendant does not enter a voluntary general appearance or otherwise waive service of process, the issuance and service of process is indispensable to the jurisdiction of the Court, even though the Court may have jurisdiction of the subject matter....
>
> * * *
>
> Prior to the filing of the appellee's complaint, there was no cause pending in the Circuit Court, so as to give that Court jurisdiction over the person of appellant.... (Emphasis added)

The plaintiff argued in the above case that service of process was unnecessary under the wording of the statute under which plaintiff was proceeding. The court rejected this argument, stating on page 221:

> If we were to give this language the interpretation urged by appellee, it would violate the Federal and Florida Constitutional guarantees of due process of law, which concept includes notice and opportunity to be heard and to defend before a competent tribunal vested with jurisdiction of the subject matter of the cause. It will not be presumed that the Legislature intended to enact a statute which does away with due process of law.
>
> There can be no doubt that the cited language of the statute gives the Circuit Court jurisdiction of the subject matter. But it does not, and no statute can, give the Court

> jurisdiction over the person unless process is properly issued or waived....

The Fourth District considered this argument in the present case and stated on page 7:

> ... We lean toward the view, without deciding, that service of a formal writ is an absolute requirement to obtain personal jurisdiction over the authority it is claimed illegally restrains the body of the captive individual. We need not decide the issue, however, as it involves jurisdiction over the person, which, if defective, renders the order voidable only, not void. One may not disobey with impunity the order of a court which is merely voidable, as here.

The Fourth District has cited no authority for the above proposition, which is that the defendants had to obey the order of court, even though the court had no jurisdiction over them. It is difficult to understand how a court can hold someone in contempt when the court has no jurisdiction over his person, which the Fourth District acknowledged. The cases are to the contrary. In Klosenski v. Flaherty, 116 So.2d 767 (Fla. 1959), this court stated on page 768:

> This court has said that "the real purpose of the service of summons ad respondendum is to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff and, therefore, to vest jurisdiction in the court entertaining the controversy ***. State ex rel ." State ex rel. Merritt v. Heffernan, 1940, 142 Fla. 496, 195 So. 145, 147, 127 A.L.R. 1263 (Emphasis added.) In a

> very early case it was held that "a summons, regularly served, as required by the [statute or rules], gives the court jurisdiction of the person of the defendant." Shepard v. Kelly, 1849, 2 Fla. 634, 655. . . .(Emphasis supplied by court).

While we are confident of our position that as a matter of law the lower court had no jurisdiction over the subject matter to issue an oral writ based on an oral application, and no jurisdiction over the defendant until a writ was served, we do wish to reiterate that petitioners' decisions to not comply with the court's oral order were not made without careful consideration.

After receiving the telephone call from the lawyer, the judge telephoned Lt. Gabbard and stated that she was "issuing an oral writ of habeas corpus to bring John Wayne Melody before me immediately" (R 36). At that point Melody was being polygraphed (R 49). Lt. Gabbard declined in a respectful manner (R 36-37). The judge then requested to speak with Chief Jamason, who also refused to comply with the oral order. Lt. Gabbard had been instructed by Chief Jamason not to comply with such an order without consulting him (R 37-40). Chief Jamason testified that this had happened previously, and although he did not like it, he had complied with the oral order (R 59). It was the same judge (R 59). Subsequently he had consulted with counsel and had

been advised that an oral order is not a lawful order and a writ cannot be issued without sworn testimony (R 60). If the suspect had still been in their custody at the time the written writ was served the defendants would have complied (R 50-51).

CONCLUSION

The case law is clear that the trial judge had no jurisdiction over the subject matter because there was no "affidavit or evidence" nor anything in writing by way of application for the writ or constituting the writ itself. Furthermore, since there was no service, the court had no jurisdiction to order the defendants to bring the suspect before her. If we are correct on either of the above statements, then the certified question should be answered in the negative, the decision of the Fourth District quashed, and the trial court instructed to vacate the adjudications of contempt.

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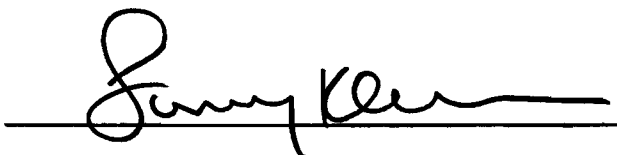
By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by mail, this 11th day of May, 1983, to:

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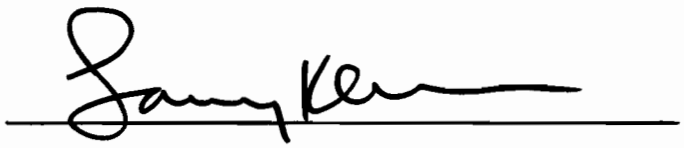

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