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' REPLY BRIEF ON MERITS ON CERTIFIED QUESTION

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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

On page 1 the State says that the suspect "received his rights". We are not sure what this statement means. The record shows the suspect was advised of his constitutional rights and did not desire to have a lawyer or to contact anyone in this regard (R 30).

On pages 1 and 2 the State argues that the petitioners had no idea whether there had been a written application for writ of habeas corpus at the time they received the telephonic order from the court. Apparently the State is attempting to make the point that it was possible there had been a proper application for the writ. The State's argument, however, serves to point out the need for having a proper application for writ and for service. Without service the respondent has no way of knowing whether there has been an application for writ or even whether the person at the other end of the telephone is indeed a judge.

On page 2 the State says that Major Mann "intercepted" the writ and hindered service of it suggesting that there was some delay. The record shows that the writ was served at approximately 12:15 P.M. and at that point in time the suspect was no longer in the custody of the West Palm Beach Police, having been transferred to the Palm Beach County Jail in custody of the sheriff (R 48). There is no evidence of delay or evasion.

On page 2 the State suggests that the petitioners were not in good faith because they were told by the attorneys they consulted to obey any oral writ. This is absolutely not true. The State's record references show that the legal advice they received indicated that the judge did not have the authority to act in this particular manner, that the oral order was not a lawful order, and that a writ could not be issued without testimony (R 35, 60).

On page 4 the State suggests that there is no reason why, in an emergency, a writ of habeas corpus cannot be sought orally. First, there is no authority for such. Second, there was no emergency in the present case. The suspect had been read his constitutional rights and had waived the right to counsel. He was in the process of being polygraphed when a lawyer, whom he had not requested,

demanded to see him (R 49). Since a polygraph is not admissible into evidence there was no emergency. Furthermore, if the suspect were being denied a constitutional right by the failure of the petitioners to allow this lawyer to immediately see him, it could certainly be rectified in proper proceedings. There was thus certainly no emergency presented from the standpoint of the suspect.

The State does not suggest any emergency from the standpoint of the suspect, but suggests on page 5 that if a judge cannot orally control the conduct of "over zealous cops", confessions will be suppressed and criminals set free. Our answer to that is that the purpose of a writ of habeas corpus is so that one imprisoned without sufficient legal reason may obtain immediate relief. Allison v. Baker, 11 So.2d 578 (Fla. 1943). It is not a tool for judges to use to educate police officers. This writ was being sought by a lawyer who was obviously trying to get to the suspect (who waived his right to counsel) before he made a statement, gave a confession, or took a polygraph examination. For the State to suggest that we need to have oral writs so that the courts can oversee the operation of police departments in order to keep criminals from being released on technicalities simply shows the weakness of the State's position.

On page 6 the State compares what occurred in this case to the telephone call which stops an execution. The obvious difference between the two is that a prisoner on death row has been charged with a crime, tried and convicted. There are legal proceedings pending. We make no contention that, where legal proceedings are pending, oral orders are not enforceable. The Fourth District cited Sandstrom v. State, 309 So.2d 17 (Fla. 4th DCA 1975), where a lawyer was held in contempt for refusing to wear a tie pursuant to an oral order of the judge presiding over the trial in which he represented one of the parties. Where no legal proceedings have been initiated, however, a judge does not have jurisdiction to issue an oral order out of the blue.

On pages 6 and 7 the State suggests the petitioners attempted to deliberately evade having to comply with the written order "while shipping Melody out the back door". There is nothing in the record to substantiate this suggestion. The evidence showed the writ was served around 12:15 P.M. The suspect had already been taken to the county jail and was no longer in the custody of the West Palm Beach Police (R 48). Where the petitioner or suspect is not in custody of the respondent, the trial court does not have jurisdiction to entertain a petition for writ of habeas corpus. Sandstrom v. Kolski, 305 So.2d 75 (Fla. 3rd DCA

1974). Compliance with the written order is not an issue in this case. The only issue is whether the petitioners should have complied with the telephonic order, in the absence of a written order and service.

The State cites United States v. Dickenson, 465 F.2d 496 (5th Cir. 1972), which was also cited by the Fourth District, however that case also stands for the proposition that a person cannot be held in contempt for refusing to comply with an order issued by a court without jurisdiction.

On page 9 the State cites Crane v. Hayes, 253 So.2d 435 (Fla. 1971), a decision of this Court, but that decision also supports our position. This Court stated on page 441:

> Since the father was immune from service of process in this new proceeding, and in fact was not personally served, he cannot be held in contempt of court or criminally charged for his failure to obey an order which the court was without jurisdiction to enter. Any order thereupon or criminal charge arising from it is void and unenforceable as to the father.

The State has not cited one decision in which an oral order of habeas corpus has been held valid. Nor has the State cited any decision in which it has been held there can be an oral application for writ of habeas corpus made by telephone. Nor has the State made any argument to refute our cases holding that service of process is an

absolute necessity for the lower court to have jurisdiction over the petitioners.

In conclusion we would reiterate that notwithstanding the suggestions made in the State's brief, the defendants in this case were at all times respectful to the Circuit Judge and had not embarked on this course of conduct lightly. They had consulted with counsel and been advised that oral orders based on oral applications need not be complied with. They would have complied with a written writ at such time as it was served (R 36, 37, 50, 51, 60).

CONCLUSION

The oral writ based on oral application did not give the lower court jurisdiction to hold petitioners in contempt and the conviction should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by mail, this 20th day of June, 1983, to:

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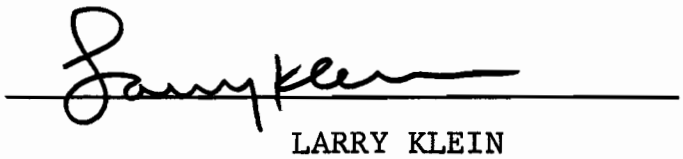

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