IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,711

NATHANIEL DEAN,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

ON PETITION FOR DISCRETIONARY REVIEW
OF THE DISTRICT COURT OF APPEAL OF
FLORIDA FOR THE THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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JURISDICTIONAL STATEMENT

Nathaniel Dean (Defendant in the Circuit Court and Appellant in the District Court of Appeal) petitions for discretionary review by the Supreme Court of Florida of the order by the District Court of Appeal, Third District, in this case. Petitioner invokes the jurisdiction of this Court pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure. The decision by the District Court of Appeal in this case expressly and directly conflicts with decisions of the Supreme Court of Florida and other district courts of appeal on the same questions of law.

STATEMENT OF THE CASE

Background:

Petitioner and a co-defendant, Nimrod Harmon, were charged by information with one count of conspiracy to commit grand larceny in violation of Fla. Stat. Section 777.04 (Count 1); and 38 counts of grand larceny in violation of Fla. Stat. Section 812.021(1)(a) (Counts 2-39). (R. 1-47). 1/

The State alleged that Petitioner as President of the Edison Little River Self-Help Community Council, Inc. (a non-profit corporation) and Harmon (Treasurer of Edison Little River) had conspired and did appropriate sums of money for Petitioner's personal, family or private, busines use.

Pretrial and Trial Proceedings:

Prior to trial, Petitioner filed a timely motion to

1/ "R." References are to the record on appeal. "Tr." references are to the transcript of the trial proceedings.

suppress evidence which had been seized by the State from Edison Little River under the guise of a subpoena duces tecum. When the matter came before the court for hearing, the State challenged Petitioner's standing to contest the seizure and to suppress the documents. The court denied the motion to suppress without hearing any evidence, ruling that Petitioner had no standing to challenge any illegal seizure of documents.

After the State presented its case, Petitioner rested his case without offering any evidence or testimony. Co-defendant Harmon testified in his own defense. Petitioner's counsel opened final argument, followed by co-defendant's counsel. When the State's turn for final argument came, the prosecutor stood up in open court, in front of the jury and stated:

> I think I can save the Court some time.
> The evidence speaks for itself. We rest.

(Tr. 1216). The trial judge refused to permit Petitioner's counsel to respond, and final arguments were concluded. (Tr. 1216-1217). Following the court's instructions on the law, the jury deliberated and returned guilty verdicts against Petitioner on Counts 1-28, 37 and 38. The jury found Petitioner not guilty on Counts 29-36. (R. 136-173). 2/

Appeal:

Petitioner appealed and the District Court of Appeal affirmed. Dean v. State, Case No. 79-937 (Fla. 3d DCA, filed April 5, 1983). The Court, inter alia, held that:

1. The trial court was correct in denying the motion to suppress on the basis of Petitioner's lack of standing;

2/ The jury found co-defendant Harmon guilty of Counts 7-11, and not guilty of all remaining counts. (Tr. 1354-1355).

2. The trial court's failure to sever Petitioner's trial from his co-defendant, was not an abuse of discretion; and

3. The prosecutor's remarks before the jury did not constitute argument and any error was harmless.

Judge Ferguson dissented, finding that the trial court erred in: (1) denying Petitioner's motion to suppress without an evidentiary hearing; (2) failing to sever Petitioner's case from that of his co-defendant; and (3) denying Petitioner the right to make the concluding argument to the jury. Judge Ferguson found that the conviction should be reversed and the cause remanded for a new trial and an evidentiary hearing on Petitioner's motion to suppress. Slip Op. 6-16.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS BY THIS COURT AND BY OTHER DISTRICT COURTS OF APPEAL.

This Court has jurisdiction of the present case because the District Court of Appeal has announced rules of law that expressly and directly conflict with rules of law announced by this Court and other Florida appellate courts.

A. The Motion to Suppress.

In November, 1977, Officer Gary Adams of the Dade County Public Safety Department, served a subpoena for documents on the Edison Little River Self-Help Community Council, Inc. (Tr. 298-299). The subpoena which was styled "State of Florida v. Nathaniel Dean and Nimrod Harmon, Investigation Witness Subpoena Duces Tecum," commanded the custodian of records of Edison Little River to produce:

> All books and all records of Edison Little River Self-Help Community Council, Inc., a corporation from January 1, 1975, through October 31, 1977, including general ledgers, accounts receivable ledgers, check stubs, cancelled checks, bank statements, receipts, invoices, all other records and documents, correspondence and memos relating to receipt of money, property and funds from Dade County, Florida, or any agency of the U.S. Government or State of Florida, directly or indirectly, and the disbursements or expenditures of said funds during the aforesaid time period.

(Tr. 1/28/79, pp. 28-29). Upon service of the subpoena, Officer Adams and another policeman seized most of the records subpoenaed, as well as other documents that were not covered by the subpoena. (Tr. 302, 308). At that point, two Dade County auditors who accompanied the detectives, removed the records from Edison Little River's offices and transported them to the auditor's office. (Tr. 309). These auditors were not employed by the State Attorney's office. (Tr. 310).

Prior to trial, Petitioner timely filed a motion to suppress the evidence seized pursuant to the State's investigative subpoena as well as the other documents and statements which the State obtained as a result of examining the seized records. (R. 99-100). At a pretrial hearing on Petitioner's motion, the State represented that it obtained all trial exhibits which were from Edison Little River pursuant to the subpoena. (Tr. 1/28/79, p. 31). Before Petitioner could present any evidence, the Court denied his motion. The Court held that Petitioner lacked standing to contest the seizure of items from Edison Little River. (Tr. 1/28/79, pp. 36-37).

The trial court's ruling and the appellate court's affirmance of that ruling directly conflicts with this Court's

ruling in State v. Tsavaris, 394 So.2d 418 (Fla. 1981). In Tsavaris, this Court held that a defendant had standing to object to the seizure of documents from his office pursuant to a subpoena duces tecum which was served upon his secretary. The Court noted that subpoenas duces tecum, properly used, are different from search warrants because they are indisputably less intrusive. The primary reason, this Court stated, is that a subpoena duces tecum is subject to a motion to quash prior to the production of the requested materials.

It is clear that the procedure employed in this case violated Petitioner's Fourth Amendment rights. First, the State's actions amounted to nothing more than a warrantless search and seizure of records. The protection normally afforded by a subpoena, as this Court noted in Tsavaris, is that a party has the opportunity to contest the validity of the subpoena prior to its execution. That was impossible in this case. The policemen serving the subpoena immediately seized all the documents called for by the subpoena (and others which were not included within the subpoena) and transported them from the premises. Such an action clearly violated Petitioner's Fourth Amendment rights. See Mancusi v. DeForte, 392 U.S. 364 (1968); and State v. Hayes, 305 So.2d 819 (Fla. 1st DCA 1975). 3/

The court of appeal, in affirming Petitioner's convictions, erred in holding that Petitioner's grounds for standing which he allegedly asserted in the trial court (i.e., that he was a corporate

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3/ The subpoena itself also was so overbroad that it amounted to a fishing expedition for any files at Edison Little River. See Imparato v. Spicola, 238 So.2d 503 (Fla.2d DCA 1970).

officer), was insufficient as a matter of law. The court below was wrong for two reasons. First, the court ignored Petitioner's citation in the trial court to Mancusi v. DeForte in support of his standing argument. 4/ (See Tr. 1/8/79, pp. 39-42). Second, the court ignored this Court's ruling in State v. Tsavaris, supra, that an individual in Petitioner's position would have standing to object to a subpoena that calls for records from his office. The decision by the court of appeal in this case conflicts with this Court's ruling in Tsavaris.

B. The Motions to Sever.

Rule 3.152 of the Florida Rules of Criminal Procedure provides that the trial court shall direct a severance of defendants for trial when "such order is necessary to achieve a fair determination of the guilt or innocence of one or more defendants." In the instant case, the trial court denied Petitioner's motion for severance and subjected him to a trial although: (1) his co-defendant sought to place the blame for the alleged crimes on Petitioner; (2) the co-defendant testified in his own defense and Petitioner did not testify; and (3) Petitioner had no opportunity to rebut the co-defendant's final argument. The court below, in affirming Petitioner's conviction, held that the trial court did not abuse its discretion in denying severance.

The court of appeal's decision conflicts with this Court's decision in Crum v. State, 398 So.2d 810 (Fla. 1981), and the Fourth District Court of Appeal's decision in Thomas v. State,

4/ In Mancusi v. DeForte, 392 U.S. 364 (1968), the Supreme Court of the United States held that a union officer has standing to contest a seizure and introduction of records which belong to his union local. The Court explained that DeForte and others who worked for the union could have reasonably have expected that only union officials and their personal business guests would enter the office and would have access to the records.

297 So.2d 850 (Fla. 4th DCA 1974). In Crum, supra, this Court held that a severance should be granted when necessary to avoid prejudice to a defendant by forcing him to stand trial before two accusers: the State and his co-defendant.

In the case at bar, Petitioner first learned of his co-defendant's strategy during opening arguments when counsel for co-defendant attacked Petitioner and argued Petitioner's guilt. 5/ Petitioner immediately moved for a severance of the defendants and separate trial. (R. 121-122). The trial court denied the motion (Tr. 109).

During the trial, Harmon took the stand and testified that Petitioner gave all the orders at Edison Little River, he (Harmon) had no responsibilities, and he (Harmon) signed checks at Petitioner's request and direction. (Tr. 1088-1130).

Petitioner renewed his motion to sever on several occasions during the trial, (Tr. 154, 410-411, 481, 1081-1082), arguing that he was prejudiced by co-defendant's posture that the blame for the criminal conduct lay with Petitioner. The trial court denied each motion.

In closing argument, Harmon's counsel renewed his verbal attack on Petitioner. Counsel accused Petitioner of "cover[ing] his ass" and laying the blame on everyone else (Tr. 1200-1201). He argued that Petitioner may be "a man who steals" (Tr. 1209), and concluded: "I think the evidence has shown that Mr. Dean is a thief, is an embezzler. He used people." (Tr. 1210).

5/ Defense counsel told the jury that: Petitioner embezzled money for his gas station (Tr. 52); Petitioner stole money for Mozell Wright (Tr. 53); Petitioner created a scheme to take money from Edison Little River and used people to his own advantage (Tr. 53); co-defendant, Harmon, fell into Petitioner's scheme to steal money (Tr. 58); and Petitioner was guilty of the crimes charged (Tr. 65).

Since the trial judge required Petitioner to present his final argument before co-defendant (Tr. 1168-1170), Petitioner was unable to rebut co-defendant's arguments.

In Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974), the court reversed the conviction of a defendant on the ground that the judge should have ordered a severance of his trial because of a conflict between the defendants' defenses. The court also reasoned:

> This became a definite problem when the defendant elected not to testify and the co-defendant took the stand. The defendant was required to make his final argument prior to that of the co-defendant and had no opportunity to rebut arguments of the co-defendant putting the blame on the defendant.

297 So.2d at 852.

The holding in the instant case conflicts with the holdings of Crum and Thomas. Here, the defendants had conflicting defenses, Petitioner elected not to testify although his co-defendant took the stand, and Petitioner had to present his final argument prior to Harmon's concluding remarks. Thus, Petitioner was forced to face two accusers, the State and his co-defendant. Crum v. State, supra.

C. Denial of Closing Argument.

Rule 3.250 of the Florida Rules of Criminal Procedure provides that "... a defendant offering no testimony on his own behalf, except his own, shall be entitled to the concluding argument before the jury." This Rule, which is identical to former Fla. Stat. Section 918.09, has been considered among the most inviolate and important criminal procedural safeguards.

In the present case, Petitioner neither testified nor offered any evidence in his own defense. Accordingly, he was

entitled to the benefit of Rule 3.250. Petitioner's counsel opened final argument. Counsel for the co-defendant followed with his final argument. Upon the conclusion of co-defendant's argument, the prosecutor stood up in open court, before the jury and asserted:

> "I think I can save the court some time. The evidence speaks for itself. We rest."

(Tr. 1216). At the same time the prosecutor made the statement he held up in his hand before the jury a number of his exhibits (Tr. 1218-1219, 1223).

The trial court, over objections of Petitioner's counsel, ruled the Petitioner was not entitled to make a concluding argument. (Tr. 1217-1223). In affirming Petitioner's conviction, the court below ruled that the prosecutor's statement could not be construed as argument; and if it was, the error was harmless. Slip. Op. 2.

The court of appeal's holding that the error, if any, was harmless is in direct conflict with the holdings of the Fourth and Second District Courts of Appeal that violation of Rule 3.250 can never be considered harmless error. Raysor v. State, 272 So.2d 867 (Fla. 4th DCA 1973); and Gari v. State, 364 So.2d 766 (Fla. 2d DCA 1978). As the Court explained in Raysor v. State, 272 So.2d at 869:

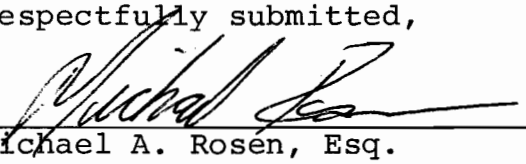
> [W]e are at a loss as a practical matter to know just how any criminal defendant could in fact make a demonstration of error because of the refusal of the trial court to follow the dictates of the rule. It is inherent in the procedure, as all acquainted with trial tactics know, that the right to address the jury finally is a fundamental advantage which simply speaks for itself.

The ruling of the court below is in direct conflict with these decisions.

CONCLUSION

The issues involved in this case are significant and important. The court below has in effect sanctioned a procedure whereby law enforcement officers, under the guise of a subpoena duces tecum, can enter a business office and seize documents without a warrant; and thereafter, bar a corporate officer from challenging the illegal seizure of documents, even if the individual may have had a reasonable expectation of privacy with respect to those documents. The court of appeal also has for the first time subjected to the harmless error rule a defendant's right to the closing argument. For the foregoing reasons, the Court should grant the petition for discretionary review.

Respectfully submitted,



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