IN THE SUPREME COURT OF FLORIDA

HOLLIS JONES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: 64,042

PETITIONER'S INITIAL BRIEF ON MERITS

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AUTHORITIES CITED

OTHER:

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

On Appeal in the Fourth District Court of Appeal, the Petitioner was the Appellee and the Respondent was the Appellant.

In the brief the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND THE FACTS

The trial court placed Petitioner on fifteen years probation for sexual battery on May 30, 1975. R20. On February 9, 1981, the Department of Corrections filed an affidavit in the trial court charging that Petitioner violated his probation by committing the offense of false imprisonment on April 4, 1980, in Jacksonville. R26. When the case came up for the final revocation hearing on May 15, 1981, the prosecutor told the trial court he had no witnesses or other evidence against Petitioner. The trial court then dismissed the charge, pronouncing, "The Defendant is discharged." S11. The State did not appeal the trial court's ruling.

On May 28, 1981, the Department of Corrections again filed an affidavit of violation alleging that Petitioner violated his probation by committing the offense of false imprisonment on April 9, 1980 in Jacksonville. R29* On Petitioner's motion to dismiss on the basis of former jeopardy, res judicata, and collateral estoppel, the trial court again discharged Petitioner on April 20, 1982. The State appealed from this last order, R33, and moved that the trial court extend the time for the final hearing under the speedy trial rule. R36.

The Court of Appeal treated the State's appeal as a petition for writ of certiorari, and granted the writ, finding

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*This charge was the same as that on which he had previously been dishcarged.

that the trial court "erroneously granted the motion to dismiss of Hollis Jones on the grounds of double jeopardy." Al.

POINT I

THE STATE MAY NOT OBTAIN CERTIORARI REVIEW OF DECISIONS OF THE TRIAL COURT WHERE IT HAS NO RIGHT OF APPELLATE REVIEW.

There is no statutory authority or rule authorizing an appeal by the State in this instance. There is no constitutional right to appeal. This Honorable Court should not question the wisdom of the legislature in failing to authorize an appeal by the State under the circumstances here presented. And more importantly, this Honorable Court should not provide what the legislature has denied in the form of certiorari. This would frustrate the legislative intent. It would be nothing more than judicial legislation. Where the Court has a jurisdictional limitation to the consideration of the appeal from a judgment, certiorari may not be used to circumvent that limitation. State v. Brown, 330 So.2d 535 (Fla. 1DCA, 1976), Nellen v. State, 226 So.2d 354 (Fla. 1DCA, 1969), Couse v. Canal Authority, 197 So.2d 841 (Fla. 1ST DCA 1967), cert. discharged, 209 So.2d 865 (Fla. 1968), State v. G.P., 429 So.2d 786 (Fla. 3DCA, 1983).

In State v. G.P., supra, the Third District expressly declined to review rulings in the Juvenile Division by way of the writ of common law certiorari as follows:

> Both parties seem to be in agreement that because there is no right to appeal we may elect to treat the present notice of appeal as a petition for common law certiorari. An historical overview of the development of the common law writ of certiorari leads us to conclude that the state may not utilize the petition to seek review of a final judgment in a criminal case not otherwise appealable.
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> * * * * * * * *

> Having examined the historical underpinnings of the district courts' power of certiorari, we conclude that the courts' review by certiorari of final judgment is limited to the supervisory review of a decision of a lower court sitting in its appellate capacity where the circuit court has departed from the essential requirements of law. Nellen v. State, 226 So.2d 354 (Fla. 1st DCA 1969); see also Lee v. State, 374 So.2d 1094 (Fla. 4th DCA 1979), Fla.R.App.P. 9.030(b)(2)(B). Where the Court has a jurisdictional limitation to the consideration of the appeal from a final judgment; certiorari may not be used to circumvent that limitation. State v. Brown, supra; Nellen v. State, supra; Couse v. Canal Authority, 197 So.2d 841 (Fla. 1st DCA 1967), cert. discharged, 209 So.2d 865 (Fla. 1968). We recognize that we are in conflict with several of our sister courts which have adopted a more expansive interpretation of the petition for certiorari, but in light of the foregoing, we decline to follow their lead.
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> In the present case, the state seeks a petition of certiorari of a lower court order sitting in its trial capacity. Clearly, such a ruling is not within our purview to supervise and accordingly, we decline to do so. Id., at 788,789-790. (Footnotes omitted.)

In State v. C.C., ___ So.2d ___ (Fla. 3DCA, March 24, 1983)[8FLW938], the court held that the State was not entitled to seek appellate review. Judge Schwartz wrote in his concurring opinion:

> Moreover, since, as I believe, the Supreme Court has not generally provided for review of any interlocutory orders in these cases, I think it unwise and perhaps impermissible for us to circumvent that decision by treating a thus-unauthorized notice to appeal as a petition for certiorari. The effect of this in the

> case, for example, of an order suppressing a confession, which is before us in Case No. 81-2564, would be for this Court to write a juvenile rule equivalent to criminal Fla.R.App.P. 9.140(c)(1)B. But we have no authority to and should not permit review in an instance in which the Supreme Court has deliberately declined to do so.

In State v. Brown, supra, the Court found that the State did not have a right to appeal the Order. The Court also declined to treat the Notice of Appeal as a Writ of Certiorari saying:

> Finally, the State urges this Court to in the alternative treat the Notice of Appeal as a Petition for Writ of common law certiorari and review the controverted order. As stated above, appellate review of a judgment of acquittal entered in a criminal proceeding is not authorized. The state's ore tenus motion for common law certiorari is denied. Id. at 536.

Therefore, based on the authorities cited herein, the Fourth District Court of Appeal erred by treating the notice of appeal as a petition for writ of common law certiorari. Hence the decision at bar should be reversed and the State's appeal dismissed.

POINT II

WHERE THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF LAW, THE COURT OF APPEAL ERRED BY TREATING THE STATE'S IMPROPER APPEAL AS A PETITION FOR THE WRIT OF CERTIORARI, AND BY GRANTING THE WRIT.

The government was not entitled to certiorari review of a trial court ruling which did not depart from the essential requirements of law. To obtain the writ of common law certiorari, any litigant, even the State of Florida, must show that the lower court failed to comply with the essential requirements of law. Kennington v. Gillman, 284 So.2d 405 (Fla. 1DCA, 1973). This standard is the same as that for fundamental error. Gulf Cities' Gas Corp. v. Cihak, 201 So.2d 250 (Fla. 2DCA, 1967). Accordingly, the issue now before this court is whether the trial court departed from the essential requirements of law.

Section 948.06(1), Florida Statutes (1981) provides:

> Whenever within the period of probation there is reasonable ground to believe that a probationer has violated his probation in a material respect, any parole or probation supervisor may arrest such probationer without warrant wherever found, and forthwith shall return him to the court granting such probation. Any committing magistrate may issue a warrant upon the facts being made known to him by affidavit of one having knowledge of such facts for the arrest of the probationer, returnable forthwith before the court granting such probation. Any parole or probation supervisor, all officers authorized to serve criminal process, and all peace officers of this state shall be authorized to serve and execute said warrant. The court, upon the probationer being brought before it,

> shall advise him of such charge of violation and if such charge is admitted to be true may forthwith revoke, modify, or continue probation and, if revoked, shall adjudge the probationer guilty of the offense charged and proven or admitted, unless he shall have previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation. If such violation of probation is not admitted by the probationer, the court may commit him or release him with or without bial to await further hearing, or it may dismiss the charge of probation violation. If such charge is not at said time admitted by the probationer and if it is not dismissed, the court, as soon as may be practicable, shall give the probationer an opportunity to be fully heard on his behalf in person or by counsel. After such hearing, the court may revoke, modify, or continue the probation. If such probation is revoked, the court shall adjudge the probationer guilty of the offense charged and proven or admitted, unless he shall have previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation.
>
> (e.s.)

Thus it is entirely within the power of the court to dismiss the charge for no good reason at all. The law does not require that the trial court conduct a violation of probation hearing, and the trial court may dismiss the charge even if the probationer admits his guilt. Whereas the State Attorney has some constitutional interest in being able to proceed on a criminal charge brought by the State Attorney, he has no such interest as to a charge of violation of probation. From the foregoing, it is hard to see how an order dismissing a charge of

probation violation can ever constitute fundamental error.*

In any event, the instant action by the trial court was not erroneous. The doctrines of collateral estoppel, res judicata, and double jeopardy, as well as the very nature of the probation proceedings, support the conclusion that the trial court's action was proper.

A. Collateral estoppel. In United States v. Oppenheimer, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 151 (1916), the court held that the Fifth Amendment barred the Government from proceeding anew on a charge that had previously been dismissed on an incorrect application of the statute of limitation. Even though jeopardy had not attached and the trial court initially dismissed the case on a motion, collateral estoppel imposed a constitutional bar to further proceedings.

Relying on Oppenheimer, the court in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), held that the United States Constitution bars litigation of an issue already "determined by a valid and final judgment," 397 U.S. at 443. Accordingly, the question is not whether jeopardy

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*Likewise, the constitution confers on the government no right to a final probation revocationhearing. See South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), holding that a state is not a "person" for the purposes of the due process clause. The trial court did not deprive the State of life, liberty or property so that the law required no final hearing before the court exercised its discretion by dismissing the charge.

has attached, but whether a "valid and final judgment" has already disposed of the question at bar. Sub judice, the May 15, 1981 discharge was valid and put an end to the judicial labor. It disposed of the issue of whether there was any evidence to support revocation of probation. Therefore, Ashe forbids relitigation of the same issue and the trial court's action was proper.

In State v. McCord, 402 So.2d 1147 (Fla. 1981), the State charged McCord with a misdemeanor in county court and with a felony in circuit court, with both crimes involving the same search. The county court ruled the search illegal, and McCord sought to use the doctrine of collateral estoppel to estop the State from opposing his subsequent motion to suppress in the circuit court. This Court wrote in dicta* that collateral estoppel applies in criminal cases only where jeopardy has attached. It appears from the footnote in McCord that this Court reached that conclusion on the basis of an erroneous interpretation of federal constitutional law made by McCord's counsel. 402 So.2d at 1149. Petitioner respectfully submits that this Court should recede from its dicta in McCord in view of Oppenheimer's holding that collateral estoppel does apply to criminal proceedings even where jeopardy has not attached.

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*The actual holding in McCord --- that collateral estoppel did not apply with respect to a motion to suppress -- was correct since an order granting a motion to suppress is not a final order.

B. Res judicata. The doctrine of res judicata also applies to criminal proceedings. In Collins v. Loisel, 262 U.S. 426, 43 S.Ct. 681, 67 L.Ed.1062 (1923), the court specifically wrote that res judicata applies to habeas corpus and other criminal proceedings. Collins was illegally arrested and obtained his release on a writ of habeas corpus. During the course of that proceeding he was arrested again, this time legally. The court rejected his narrow claim that his earlier successful petition estopped the U.S. Marshall from holding him pursuant to the lawful arrest, but Justice Brandeis wrote for the unanimous court:

> It is true that the Fifth Amendment, in providing against double jeopardy, was not intended to supplant the fundamental principle of res judicata in criminal cases [cit]; and that a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as res judicata.
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> 262 U.S. 430

Likewise, Justice Holmes wrote in Oppenheimer, supra:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice [cit.] in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.
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> 37 S.Ct. 69

Thus, even if double jeopardy and collateral estoppel do not apply to probation hearings, then res judicata must apply. Otherwise the State could repeatedly refile the same

affidavit until it obtained a judge or a result to its liking. It applies even to probation proceedings because finality of judgments is a fundamental tenet of our law, Collins, supra. This Court has likewise written that it is basic to the jurisprudence of all civilized nations and that it is a fundamental doctrine. McGregor v. Provident Trust Co., 119 Fla. 718, 162 So.323 (Fla. 1935). As such it is part of that concept of basic fairness we call due process. Even the probationer, the stepchild of our jurisprudence, is entitled to fair treatment and due process of law. Gagnon v. Scarpelli, 411 U.S. 779, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). As Justice Holmes worte in Oppenheimer, supra:

> It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.
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> 242 U.S. at 87

Serfass v. U.S., 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975), upon which the State relied below, does not avail the State. Serfass involved a direct appeal from a motion to dismiss. Since it was a direct appeal, estoppel and res judicata posed no bar to the government.

Oppenheimer and Collins, on the other hand, show first that res judicata is a constitutional doctrine of finality, and second that it applies regardless whether "jeopardy" has attached.

C. Double joepardy. As the State so frequently asserts, a probation hearing is in the nature of a sentencing hearing. Double jeopardy does apply to sentencing hearings regardless whether testimony is taken or jeopardy attaches in the sense that refers to trial proceedings. Otherwise this Court would not have required in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981) that the length of a new "straight" sentence not exceed the length of the "split" sentence which it supersedes. Villery follows the mandate of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) that double jeopardy does apply to sentences. At bar, the State seeks two (or more) sentencing hearings as to Appellant for the same alleged wrongdoing. Our Constitution forbids such grave abuses. See Oppenheimer, supra.

D. Nature of the proceeding. As already noted, the disposition of a probation case is peculiarly vested in the discretion of the trial court. Since the trial judge's ruling is like that at a sentencing hearing, the decision of the trial judge will rest unmolested so long as the court acted within the bounds of its discretion, however harsh (or lenient) the result. Laird v. State, 394 So.2d 1121 (Fla. 5 DCA 1981). No doubt the "conscience of the court" was dissatisfied by the State's misfeasance. The trial court acted within its jurisdiction and its order must stand.

POINT III

THE COURT OF APPEAL ERRED WHERE IT GRANTED THE WRIT OF COMMON LAW CERTIORARI WHERE NO INITIATING DOCUMENT WAS TIMELY FILED.

Florida Appellate Rule 9.100(c) provides that a petition for common law certiorari must be filed within 30 days of rendition of the order to be reviewed. The record shows that the notice of appeal was filed June 7, 1982. R37. The order appealed from was rended June 9, 1982. R39. Nothing remotely resembling a petition for certiorari was filed thereafter. Accordingly, the court of appeal had no jurisdiction to grant the writ of common law certiorari. Cf. Crawford v. Wainwright, 222 So.2d 188 (Fla. 1969).

CONCLUSION

This Court should grant the writ of certiorari and reverse the order of the Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to JOAN FOWLER ROSSIN, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 23 day of January, 1984.