IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,395

THE STATE OF FLORIDA,

Petitioner,

vs.

J.M., a juvenile,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

REPLY BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

CHARLES M. FAHLBUSCH
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(continued)

TABLE OF CITATIONS
(continued)

TABLE OF CITATIONS
(continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the Appellant/Petitioner in the Third District Court of Appeal and the prosecution at the circuit court level. Respondent was the Appellee/Respondent in the district court and the Respondent in the circuit court. The parties will be referred to as they stand before this court.

The symbol "R" will be used to refer to the Record-on-Appeal from the circuit court, "S.R." will refer to the Supplemental Record-on-Appeal and the symbol "T" will identify the transcript of lower-court proceedings. The symbol "App." will refer to the Appendix attached to the Brief of Petitioner on the Merits filed herein.

STATEMENT OF THE CASE

The Respondent was charged by a two count petition for delinquency with loitering and prowling and carrying a concealed firearm. (T.3). The Respondent filed a pre-trial motion to dismiss the loitering and prowling count, and a motion to suppress his confession. (R.5-10). After a hearing, the trial court granted both motions. (R.15, S.R., T.33,34,60,66). After ruling, the court announced that the State's right to appeal its ruling was preserved. (T.70).

STATEMENT OF THE FACTS

Police Officer Pedro A. Marias and his partner approached the Respondent and five other individuals, who had been sitting for 10 minutes in a parked car in a high crime area. (T.14-17). The officers asked the six suspects to exit the car, which they did. (T.17). When the passenger door opened, Officer Marias' partner saw a gun. (T.27). A check revealed two (2) guns, one of which was directly underneath the seat Respondent had been sitting in. (T.61-62). The suspects were arrested, and asked what they were doing, prior to being advised of their Miranda rights. (T.22, 23, 29). The suspects replied that they were waiting for a friend. (T.18).

Officer Marias then read the Miranda warnings to the suspects as a whole. (T.39). While Officer Marias testified that the suspects as a whole indicated that they understood, he could not specifically recall if the Respondent expressed understanding. (T.40).

The suspects were then brought to the police station, where the Respondent was separated from the rest. (T.41, 43). Officer Marias asked the other people, who had come to the station, if anyone knew who the gun belonged to, and one of the relatives of a suspect replied that the Respondent

waited to talk to him. (T.42, 43). Officer Marias then went to the Respondent, who confirmed that he wanted to talk. (T.46). Officer Marias responded, "I'm going to read your rights before you even say anything." (T.44-46). Officer Marias then took out his Miranda card, which he read completely and very slowly. (T.44, 47, 49-51, 57). The Respondent reiterated that he wanted to talk, and when asked if he understood his rights, he replied that he did. (T.44, 51, 52, 58). Officer Marias then asked the Respondent "What is it you want to tell me." (T.48, 51, 52, 58). The court suppressed the confession which followed because it felt that the Miranda warnings were inadequate. (S.R., T.60, 66, 67, 71).

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE APPEAL WITHOUT DETERMINING IF THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN SUPPRESSING THE STATEMENT OF RESPONDENT AS INVOLUNTARY WHERE HE WAS TWICE READ HIS MIRANDA RIGHTS, INDICATED THAT HE UNDERSTOOD THEM, AND SPECIFICALLY ASKED TO MAKE A STATEMENT TO THE POLICE? (Restated).

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the appeal without first determining if the standards for common-law certiorari had been met since the trial court specifically departed from the essential requirements of law in a manner that irreparably prejudiced the State's case when it suppressed the respondent's statement which had been volunteered, at the respondent's instigation, after respondent had been twice advised of his Miranda rights.

Thus, the standards for certiorari were properly met and a writ of certiorari should have issued, in this case.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE APPEAL WITHOUT DETERMINING IF THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN SUPPRESSING THE STATEMENT OF RESPONDENT AS INVOLUNTARY WHERE HE WAS TWICE READ HIS MIRANDA RIGHTS, INDICATED THAT HE UNDERSTOOD THEM, AND SPECIFICALLY ASKED TO MAKE A STATEMENT TO THE POLICE. (Restated).

Since the requirements for common-law certiorari could clearly have been met in the case sub judice, the Third District Court of Appeal reversibly erred in entering an order of dismissal before determining if the trial court had departed from the essential requirements of law in excluding a witness who was critical to the State's case.

The Constitution of the State of Florida provides for appellate and extraordinary writ jurisdiction in the district courts of appeals in Article V, §§4(b)(1) and 4(b)(3), Constitution of the State of Florida (1968). These provisions constitute an update of similar provisions in the Constitution of 1885.

The old section was held to constitutionally guarantee the right of appeal in a case in which this court stated that statements and rules regulating the exercise of appellate rights should be liberally construed in favor of the

appealing party. Robbins v. Cipes, 181 So.2d 521 (Fla. 1966). Further, it has long been settled that an appeal improvidently taken shall be treated by the reviewing court as a petition for writ of certiorari. Ogle v. Pepin, 273 So.2d 391 (Fla. 1973); Ross v. Bowling, 233 So.2d 415 (Fla. 3d DCA 1970). This court holds that it, not the legislature, has the sole authority under the Constitution for deciding what appeals may be taken (from interlocutory orders). In Interest of R.J.B., 408 So.2d 1048 (Fla. 1982). Therefore, it is easy to understand why improvident appeals are treated as petitions for certiorari, since all appellate review is by appeal except where review by certiorari is permitted, certiorari being the traditional proceeding by which to obtain review of orders, judgements and decrees of inferior tribunals. Thomas Jefferson, Inc. v. Hotel Employees Union, 81 So.2d 731 (Fla. 1955); Powell v. Civil Service Board of Escambia County, 154 So.2d 917 (Fla. 1st DCA 1963); Pullman Company v. Fleishel, 101 So.2d 188 (Fla. 1st DCA 1958).

However, recent cases from this court have seemed to indicate that, in certain classes of actions (juvenile cases, dismissals of probation violation cases), the State not only has no right to appeal, but it has no right to petition the appellate courts for certiorari, either. Jones

v. State, 10 F.L.W. 565 (Fla. Oct. 17, 1985); State v. G.P., 10 F.L.W. 469 (Fla. Aug. 30, 1985); J.P.W. v. State, 10 F.L.W. 486 (Fla. Aug. 30, 1985); State v. C.C., 10 F.L.W. 435 (Fla. Aug. 29, 1985). Further, despite F.S. §2.01, which purports to adopt the common-law remedies, such as petition for certiorari, these cases appear to abrogate the right of the people of Florida (through their representative, the State) to seek review by certiorari in those cases in which they are not entitled to an appeal. Jones v. State, 10 F.L.W. 565 (Fla. Oct. 17, 1985); State v. G.P., 10 F.L.W. 469 (Fla. Aug. 30, 1985); J.P.W. v. State, 10 F.L.W. 486 (Fla. Aug. 30, 1985). It is submitted, in accordance with Justice Boyd's concurring opinion in the Jones case, that this Court did not intend to overturn many decades of well-established common-law doctrine on the subject of the writ of certiorari by holding that, when there is no entitlement to appeal, certiorari is ipso facto not available as a remedy. Instead, the more reasonable interpretation would be that, in these cases, the court found that the situations did not meet the standards for common-law certiorari and, therefore, were not reviewable by that method. This interpretation harmonizes the position this Court has taken in the above-referenced actions with its previous position that the constitutional definitions of jurisdiction of courts is controlling and certiorari may issue to review a judgement of the circuit court where no

appeal or writ of error is provided by law. South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675 (Fla. 1939).

This position is also consistent with other prior holdings on the subject. Where it clearly appears that there is no adequate and complete remedy by appeal, the court will consider granting a writ of certiorari. (emphasis added). Brooks v. Owens, 97 So.2d 693 (Fla. 1957). Certiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal in a judicial proceeding and is available to obtain review in situations when no other method of appeal is available (emphasis added). De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). In determining whether to consider a petition for writ of certiorari, the District Court of Appeal should not narrowly construe the rule that only departures from the essential requirements of law should be considered so as to apply only to violations which deny appellate review or pertain to regularity of procedure; the district courts should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Combs v. State, 436 So.2d 93 (Fla. 1983). The writ will lie to review all interlocutory orders of circuit courts. Greater Miami Development Corporation v. Pender, 194 So. 867 (Fla. 1940). The Florida Appellate Rules do not abrogate the jurisdiction of the District Courts of Appeal to review by certiorari

interlocutory orders at common-law where it is apparent that there has been a departure from the essential requirements of law, and the petitioner does not have an adequate remedy by appeal after judgement. Shell v. State Road Department, 135 So.2d 857 (Fla. 1961). Where the judgement of the circuit court is rendered without or in excess of its jurisdiction, is a palpable miscarriage of justice, or is illegal or essentially irregular and violates established principles of law, and may reasonably and probably result in substantial injury to the legal rights of the petitioner, and there is no other adequate remedy at law, the common-law writ of certiorari will lie. Janet Realty Corporation v. Hoffman's, Inc., 17 So.2d 114 (Fla. 1943). In Interest of J.S., 404 So.2d 1144 (Fla. 5th DCA 1981); Pet. for rev. dismissed, 412 So.2d 467 (Fla. 1982); Gordon v. Barley, 383 So.2d 322 (Fla. 5th DCA 1980).

While it is certainly correct that a petition for certiorari is no substitute for appeal since, for one thing, certiorari will not lie to review the judgement of an inferior court if there is any other adequate remedy. Lewis v. Lewis, 78 So.2d 711 (Fla. 1955). Further, common-law certiorari will be issued only in exceptional cases, such as where an interlocutory order does not conform to the essential requirements of law and may cause material injury throughout subsequent proceedings for which an appeal will be inadequate. Kauffman v. King, 89 So.2d 24 (Fla. 1956).

Chicken 'N' Things v. Murray, 329 So.2d 302 (Fla. 1976).

Public policy also supports this view, since traditional policy, based upon traditional concepts of fairness, is clearly in favor of allowing both parties to an action some sort of appellate review. Indeed, if there are cases, such as juvenile, where the people of Florida through their representative, the State, have no opportunity to seek review, then the trial courts become the final arbiter on all issues, including those of Constitutional dimension (so long as they err against the State). This is the specific situation abhorred by Justice Shaw in State v. White, 470 So.2d 1377 (Fla. 1985), footnote 1. It is respectfully suggested that justice is not furthered by putting trial court judges throughout the state on notice that, if they err on the side of the defense, there is no danger that they will or reversed by the appellate courts. However, should they err on the side of the State, reversal becomes a distinct possibility.

In the case sub judice, there was an essential departure from the requirements of law which prevented the State from being able to prosecute its case and which led to its dismissal.

In granting the Respondent's motion to suppress, the

trial court stated that the basis for its ruling was that the Miranda warnings which preceded the confession were inadequate. (S.R., T.60, 66, 69, 71). The court's ruling was an essential departure from the requirements of law since the Respondent's confession was not the product of custodial interrogation so there was no need for Miranda warnings; and alternatively that the warnings which preceded the confession were sufficient.

Police Officer Pedro A. Marias' undisputed testimony on the issue before this Court[1] is as follows: Officer Marias and his partner approached the Respondent and five other individuals, who had been sitting for 10 minutes in a parked car in a high crime area. (T.14-17). The officers asked the six suspects to exit the car, which they did. (T.17). When the passenger door opened Officer Marias' partner saw a gun. (T.27). A check of the car revealed two (2) guns, one of which was directly underneath the seat Respondent had been sitting in. (T.61-62).

Officer Marias then read the Miranda warnings to the

[1]The adequacy of the Miranda warnings, which immediately preceded the Respondent's confession is the sole issue before this Court, since the granting of the motion to suppress was based exclusively on the court's finding that the warnings were inadequate. See State v. Pratt, 386 So.2d 1249 (Fla. 4th DCA 1980).

suspects as a whole. (T.39). While Officer Marias testified that the suspects as a whole indicated that they understood, he could not specifically recall if the Respondent expressed understanding. (T.40).

The suspects were then brought to the police station, where the Respondent was separated from the rest. (T.41, 43). Officer Marias asked the other people, who had come to the station, if anyone knew who the gun belonged to, and one of the relatives of a suspect replied that the Respondent wanted to talk to him. (T.42, 43). Officer Marias then went to the Respondent, who confirmed that he wanted to talk. (T.46).

At this point, Officer Marias readvised the Respondent of his Miranda rights. The State submits that warnings were not required, since the Respondent had indicated his willingness to make a voluntary statement in the absence of police interrogation. Since Respondent's eventual confession was not the product of custodial interrogation, the trial court erred in ruling the confession inadmissible even if the Miranda warnings were inadequate. Jacobs v. State, 396 So.2d 713 (Fla. 1981); Spikes v. State, 405 So.2d 430 (Fla. 3d DCA 1981); State v. DeConingh, 400 So.2d 998 (Fla. 3d DCA 1981); Myers v. State, 256 So.2d 400 (Fla. 3d DCA 1972); Putnam v. State, 227 So.2d 60 (Fla. 2d DCA 1969); Brown v. State, 222 So.2d 793 (Fla. 1st DCA 1969); Cook v.

State, 219 So.2d 468 (Fla. 3d DCA 1969); Christopher v. State, 219 So.2d 468 (Fla. 3d DCA 1969); Simmons v. State, 227 So.2d 94 (Fla. 2d DCA 1969); Anderson v. State, 207 So.2d 518 (Fla. 3d DCA 1968).

At any rate, even if it could be said that the Respondent's confession was the product of custodial interrogation, it would still be admissible since Miranda warnings were properly administered. When the Respondent told Officer Marias that he wanted to talk, Officer Marias responded, "I'm going to read your rights before you even say anything." (T.44, 46). Officer Marias then took out his Miranda card, which he read completely and very slowly. (T.44, 47, 49-51, 57). The Respondent reiterated that he wanted to talk, and when asked if he understood his rights, he replied that he did. (T.44, 51, 52, 58). Officer Marias then asked the Respondent, "What is it you want to tell me." (T.48, 51, 52, 58). The court suppressed the Respondent's incriminating response.

The procedure in which a suspect is read his rights from a card straight through, and then asked if he is willing to talk and whether he understands his rights had been uniformly approved. United States v. Postal, 589 F.2d 862 (5th Cir. 1979); Silas v. State, 431 so.2d 239 (Fla. 1st DCa 1983); In Interest of G.G.P., 382 So.2d 128 (Fla. 5th

DCA 1980); Lewis v. State, 296 So.2d 575 (Fla. 1st DCA)974); Davis v. State, 275 So.2d 575 (Fla. 1st DCA 1973); Tudela v. State, 212 So.2d 387 (Fla. 3d DCA 1968); Brisbon v. State, 201 So.2d 832 (Fla. 3d DCA 1967). Additionally, the State submits that the trial court's ruling that Officer Marias, after ascertaining that the Respondent understood his rights and desired to talk, was obligated to ask the Respondent if despite an understanding of his rights, he wanted to talk anyhow, (T.60), is logically and legally unsupportable and contrary to cases which hold that a police officer is not required to give legal advice. Palmer v. State, 397 So.2d 648 (Fla. 1981); State v. Craig, 237 So.2d 737 (Fla. 1970); Grimsley v. State, 251 So.2d 671 (Fla. 2d DCA 1971).

In sum, the State submits that the Respondent's confession, which was not the product of custodial interrogation, would have been properly admissible against him even if not preceded by Miranda warnings, and alternatively that if Miranda warnings were required in this case, they were properly administered.

It is obvious that the State could not proceed with its case due to the departure of the trial court from the essential requirements of law in determining that the Respondent's statement was involuntary and should be suppressed. (T.67).

Therefore, the Third District Court of Appeal erred in dismissing the case sub judice without first determining if the requirements for common-law certiorari had been met.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this action should be remanded to the district court for the issuance of a writ of certiorari quashing the suppression and dismissal orders of the trial court and ordering the trial to proceed.

Respectfully submitted,

JIM SMITH
Attorney General

Charles M. Fahlbusch
CHARLES M. FAHLBUSCH
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER ON THE MERITS was furnished by mail to ELLIOT SCHERKER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33128, on this 27th day of November, 1985.

Charles M. Fahlbusch

CHARLES M. FAHLBUSCH
Assistant Attorney General

/vbm