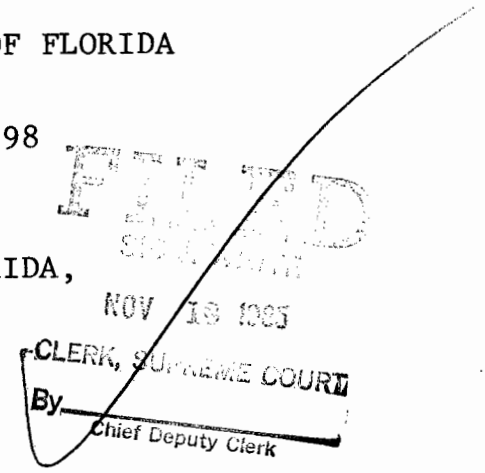
IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,398



THE STATE OF FLORIDA,

Petitioner,

vs.

A. M., a juvenile,

Respondent.

* *

ON CONFLICT JURISDICTION FROM THE DISTRICT COURT OF APPEAL

* *

REPLY BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

CALVIN L. FOX, Esquire
Assistant Attorney General
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128

(305) 377-5441

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PREFACE

The Petitioner, the State of Florida, was the prosecution in the trial court below. The Respondent was the defendant in the trial court below. In this brief, the parties will be referred to as they appear before the trial court.

The following symbol is used in this brief:

(R) For the record-on-appeal consisting of pages R1-R296.

The opinion of the Third District Court of Appeals is reported at State v. A.M., 449 So.2d 282 (Fla. 3d DCA 1983).

I.

STATEMENT OF THE CASE

The Defendant, A.M., was originally charged by a Petition for delinquency with four counts consisting of, trafficking in marijuana in excess of ten thousand (10,000) pounds; trafficking in cocaine in excess of four hundred (400) grams of cocaine and two counts of conspiracy to traffic in narcotics during April 11 to May 7, 1981. See, R1-R2. On May 8, 1981 the State filed an extensive motion to waive the Defendant over to the Criminal Division of the Circuit Court for trial. See, R4-R5. On May 12, 1981 the trial court set a waiver hearing for May 29, 1981. R6-R7. On May 14, 1981, the Defendant filed a written demand for waiver of the Defendant over to the Criminal Division of the Circuit Court for trial, which provides that:

> "COMES NOW the Respondent, by and through his undersigned attorney and respectfully demands that this Honorable Court waive jurisdiction of Said Respondent and remand this case to the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, for further proceedings. This Demand is made in accordance with Fla.R.Juv.Pro. 8.150 (a) and Florida Statute 39.02 (5)(b).
>
> "The Respondent is aware of his rights under all applicable Criminal and Juvenile Rules of Procedure and has full knowledge and understanding of this voluntary

> waiver and of the possibilities of incarceration as an adult, and after careful and considerable discussion with his attorney and parent or guardian ad litem he, joined by his parent or guardian ad litem he, joined by his parent or guardian ad litem Edris Munio, does hereby waive all rights to be treated as a juvenile in this matter and makes this formal Demand for Waiver of Jurisdiction."
>
> "[signed]: ANTONIO MUNIO"
> Respondent
>
> "[signed]: EDRIS MUNIO"
> Guardian
>
> R8.

On May 15, 1981, pursuant to brief hearings (R13-R19); (R21-R28), the trial court entered its written order transferring the Defendant to the Criminal Division of the Circuit Court. R9. The State was thereby never able to proceed on its motion for waiver.

Relative to this proceeding, on May 26, 1981, pursuant to the express provisions of Section 39.04(2)(e)(4) Florida Statutes the State filed new informations against the Defendant charging him with three counts of possession of various amounts of narcotics; one count of sale of narcotics; four counts of conspiracy to traffic in various amounts of narcotics and three counts of trafficking in various amounts of narcotics. See, R203-R210; R250-R254. Included within said new informations were written charges against the Defendant's attorney, Harold Keefe. Id.

On June 11, 1981, through different counsel[1] the Defendant filed a pleading in the original juvenile proceeding above entitled, "Withdrawal and Renunciation of Demand for Voluntary Waiver of Jurisdiction." R10-R12. Also on June 11, 1981, the Defendant filed in the two Circuit Court criminal cases pending upon the above referenced informations his pleading entitled "Motion to Dismiss or Transfer for Lack of Jurisdiction." R227-R238; R279-R289. The Defendant essentially claimed in said motions that he had renounced his voluntary waiver and now wanted a full waiver hearing. See, e.g., R227-R228. The parties agreed in the Circuit Court criminal cause to transfer the pending circuit cases back to juvenile court for a full waiver hearing and agreed to toll the speedy trial rules. See, R245-R247; R272-R275.

Relative to this proceeding, on August 12, 1981, the Defendant filed a Motion to Dismiss in the juvenile proceedings alleging that all charges should be dismissed because the juvenile speedy trial period had run. See, R30; see, also, R31-R32 (memorandum). At the hearing on the Defendant's Motion to Dismiss, the Defendant argued extensively that the State knew that the Defendant's counsel was being investigated. The State explained that it agreed to a transfer for a waiver hearing because the Defendant had

[1]Subsequent to Keefe, the Defendant was also first represented by a third attorney. See, R292.

apparently not been advised of the minimum mandatory penalties for trafficking. R73. The State, however, refused to agree that there was any conflict whatsoever prior to the filing of charges against the Defendant's attorney. See, R74-R75. The State argued that the Defendant's participation in the crimes was no minor role and that he was being groomed to take over the crime organization from Mario S. Tabraue, the kingpin. See, R68-R69. See, also, R212-R224; R276-R277 (arrest affidavit). The arrest affidavit provides that the Defendant resided in Tabraue's house and maintained a phone there, which the Defendant used. See, R85. The Defendant's bond was set at a total of one hundred and twenty-five thousand dollars ($125,000.00) in two cases. See, R85. The State vigorously contended that the Defendant knew Keefe and knew he was part of the organization and picked him anyway. R69; R84. The Court found that there was no, "deceptive or deliberate act on the part of the State." R101. The Court thereupon denied the Motion to Dismiss. R104.

The Court specially noted that application of the speedy trial rule would thwart justice. R107-R108.

Subsequently, on October 27, 1981, the Defendant filed a supplemental memorandum claiming substantially that he had been denied effective assistance of counsel. See, R117-

R122. On October 19, 1981, a second hearing was conducted at which the Chief of the Narcotics Prosecution Unit, Rina Cohan, testified. Ms. Cohan testified that the Defendant's attorney, Keefe, was an early target of her investigation of Tabraue and it was apparent that Keefe was an advisor to the organization. R145-R147. Keefe did not represent any members of the organization except Tabraue, until he showed up at the bond hearing on May 8, 1981, representing eight (8) of the members of the organization. R148-R149. Keefe indicated during the wiretap that he thought that he was being investigated. See, R154. Ms. Cohan said that she had to protect her case on Keefe until it was filed and that the evidence and application (for wiretap) were under seal at the time of the bond hearing. See, R150; R180.

With respect to the Defendant, the State had demanded a waiver hearing in Juvenile Court, but before the State could have a hearing, the Defendant executed a voluntary waiver. The State's position on the Defendant's claims was succinctly stated by Ms. Cohan thus:

> "MS. COHAN: That's-- in any event, Mr. Munio, at that time, was under a hundred and eighty day time period. He had been filed against, as an Adult. As far as I was aware, he had been voluntarily waived over to be treated as a Adult. It was after receiving a motion from Mr. Monroe, and finding out what had occurred, here, that we agreed to transfer it back to Juvenile Court. An Order for the

> original hearing which we had scheduled on May 29th, to once again be set up, and take place. We have never been unwilling to give Mr. Munio his hearing, as far as the waiver was concerned. We have not manipulated the System, to any -- to the extent which Mr. Monroe would have you believe. And, have been deprived of the ability to put on that hearing by Mr. Munio's action, and executing the -- demand to be waived.
>
> * * *
>
> "[W]e are not saying he should suffer the consequences of someone who had a conflict with his interest. And, we will give him his hearing. That is what he is entitled to. He is entitled to representation by an Attorney, who doesn't have a conflict. And, he's entitled, if he so wishes, to a hearing to be waived back to Adult Court."
>
> R190-R191.

The State had also previously argued the application of the case, W.M. v. Tye, 377 So.2d 225 (Fla. 4th DCA 1979). See, e.g. R97. At the conclusion of the hearing the trial court reserved ruling. Subsequently the trial court granted the Defendant's Motion for Discharge under the ninety (90) day juvenile speedy trial rule.

On appeal to the Third District Court of Appeal, the district court granted the Defendant's "Renewed Motion to Dismiss," opining thus:

"PER CURIAM.

"On the authority of State v. C.C., ___So.2d___ (Fla. 3d DCA 1983)(Case Nos. 81-2564, 82-666, 82-797, and 82-1825, opinion filed this date) (en banc), we dismiss the State's appeal from the trial court's order dismissing the charges against the juvenile and decline to treat the unauthorized notice of appeal as a petition for writ of certiorari. We certify that this decision directly conflicts with State v. J.P.W., 433 So.2d 616 (Fla. 4th DCA 1983), and State v. W.A.M., 412 So. 2d 49 (Fla. 5th DCA), rev. denied, 419 So.2d 1201 (Fla. 1982). We further certify to the Supreme Court of Florida that this decision passes upon a question of great public importance, namely:

> "Does the State have the authority to file plenary appeals in juvenile cases, and, if not, may this court review by certiorari an order dismissing a petition for delinquency?"

PEARSON, DANIEL, Judge, concurring.

Because this court sitting en banc in State v. C.C., ____So.2d___(Fla. 3d DCA 1983), has, over my dissent, decided these issues adversely to the State, I reluctantly concur in the panel's decision."

State v. A.M., 449 So.2d 282 (Fla. 3d DCA 1983).

On October 21, 1985, pursuant to said opinion, this Court ordered that the Petitioner (the State of Florida), should file a "Reply Brief."

II.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT PROPERLY DISMISSED THIS CAUSE?

III

SUMMARY OF ARGUMENT

Where the Common law has not been specifically abrogated it remains as the law of this State. Under the common law the District Court has jurisdiction to remedy the present departure by the trial court from the essential requirements of law. Summary dismissal was therefore improper.

IV

ARGUMENT

THE DISTRICT COURT IMPROPERLY DISMISSED THIS CAUSE.

The present issue would appear to be resolved by this Court's recent decisions in J.P.W. v. State, Case No. 63,981 (Fla. August 30, 1985) and State v. G.P., Case No. 63,613 (Fla. August 30, 1985). See, also, State v. Creighton, 469 So.2d 735 (Fla. 1985); State v. C.C., Case No. 64,354 (Fla. August 29, 1985); Cf., Jones v. State, Case No. 64,042 (Fla. October 17, 1985). However, the undersigned submits that to the extent that the present appeal is foreclosed by these decisions, this Honorable Court should reconsider its position in this case. Cf., Jones v. State, supra, (Boyd, C.J. concurring specially).

Section 2.01, Florida Statutes provides specifically that:

> "Common law and certain statutes declared in force. --The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the Legislature of this state."

By the express terms of Section 2.01, the Legislature has expressly adopted the common law into Florida jurisprudence. See, Knapp v. Frederickson, 148 Fla. 311, 4 So.2d 251 (1941); Lewis v. City of Miami, 127 Fla. 426, 173 So. 150 (1937). Therefore, unless clearly and explicitly abrogated, the common law remains in effect in Florida. See, Martin v. Mitchell, 188 So.2d 684 (Fla. 4th DCA 1966), cert. disch., 192 So.2d 281 (Fla. 1966). The common law will not be deemed abrogated by, "doubtful implication." Burklin v. Willis, 97 So.2d 129 (Fla. 1957); see, also, Llewellyn, "Remarks on Theory of Appellate Decision," 3 Vand. L.R. 395, at 401 (1950). Most respectfully, there is no lawful basis in the Florida statutes or the Florida constitution to conclude that centuries of traditional review by common certiorari have been "clearly" and "explicitly" abrogated. Cf., Jones v. State, supra, (Boyd, C.J., concurring specially). Therefore, the present summary dismissal should be reversed.

Moreover, the present cause presents a clear case of a substantial departure from the essential requirements of law. Section 39.04 (2)(e)(4) Florida Statutes (1981) specially provides the State with the discretion to file an information directly in the Circuit Court against a juvenile, where the one hundred and eighty (180) day speedy trial rule applies to wit:

> "(e) The state attorney shall in all such cases, after receiving and considering the recommendation of the intake officer, have the right to take action, regardless of the action or lack of action of the intake officer, and shall determine the action which is the best interest of the public. The state attorney may:
>
> * * *
>
> "(4) With respect to any child who at the time of commission of the alleged offense was 16 or 17 years of age, file an information when in his judgment and discretion the public interest requires that adult sanctions be considered or imposed. Upon motion of the child, the case shall be transferred for adjudicatory proceedings as a child pursuant to §39.09 (1) if it is shown by the child that he had not previously been found to have committed two delinquent acts, one of which involved an offense classified under Florida law as a felony."

In the leading decision in W.M. v. Tye, 377 So.2d 225 (Fla. 4th DCA 1979), as in the case at bar, the State had filed an information against the Defendant in Circuit Court, charging him with grand theft. The defendant in W.M. subsequently moved more than ninety days after his arrest for a transfer back to juvenile court. After the petition for delinquency was filed the Defendant in W.M., also contended that he should be discharged because the juvenile speedy trial rule had expired. In rejecting his claim on appeal the W.M. court citing Section 39.04 (2)(e)(4) held that:

> "We hold the 90 day speedy trial rule provided in Section 39.05 (7) (b) is applicable to this factual situation, but that the time the case was pending in the Circuit Court must not be counted in determining when the 90 day period expires.
>
> * * *
>
> If the petitioner's contention was upheld after the case was transferred to the Circuit Court pur suant to Section 39.04(2)(e)(4), petitioner could wait until the 90 day period had nearly expired and then have the case transferred back to Juvenile Court and there would then be inadequate time under the 90 day rule for the State to bring petitioner to trial. Surely that sort of procedural game playing was not contemplated by the Legislature.

Accord, I.H v. State, 405 So.2d 450, at 453 (Fla. 1st DCA 1981)(quoting W.M. v. Tye); State ex rel Ortez v. Brousseau, 403 So.2d 549, at 550, n. 2 (Fla. 4th DCA 1981); compare, State v. Perez, 400 So.2d 91 (Fla. 3d DCA 1981). In the present case, the "procedural game playing" which the W.M. court disapproved of should not prevail. Under W.M. the time which the Circuit Court charges were pending against the Defendant does not count towards any discharge under the juvenile speedy trial rules. The trial court therefore manifestly erred in permitting a dismissal in this circumstance.

In Jones v. State, Chief Justice Boyd explain the grounds upon which jurisdiction upon common law certiorari rests:

> "It is important to distinguish the concept of a 'departure from the essential requirements of law' from the concept of legal error. On a petition for the common-law writ of certiorari, the legal correctness of the judgment of which review is sought is immaterial. The required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error."

The, "inherent illegality or irregularity" described by Justice Boyd is plainly evident in the present cause under the express terms of Section 39.04(2)(e)(4). Therefore, review by common law certiorari is not only proper, but is also appropriate and worthy in this cause.

V

CONCLUSION

WHEREFORE, upon the foregoing, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will reverse the ruling of the Third District Court of Appeal.

RESPECTFULLY SUBMITTED, on this 15th day of November, 1985, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128

(305) 377-5441

VI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was served by mail upon KIRK MONROE, Esquire, Attorney for Respondent, Suite 331, 717 Ponce De Leon Boulevard, Coral Gables, Florida 33134, this 15th day of November, 1985.

CALVIN L. FOX, Esquire
Assistant Attorney General

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