IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,399

THE STATE OF FLORIDA,

Petitioner,

vs.

J. W., a juvenile,

Respondent.

* *

ON CONFLICT JURISDICTION FROM THE DISTRICT COURT OF APPEAL

* *

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The petitioner, The State of Florida, was the appellant in the Third District Court of Appeal and the prosecution in the trial court. The respondent, J.W., was the appellee in the Third District Court of Appeal and the respondent in the trial court. The parties will be referred to as they stood in the trial court. References to the record on appeal will be noted by the symbol "R." References to the transcript of the proceedings, attached hereto, will be noted by the symbol "T."

STATEMENT OF THE CASE AND FACTS

On October 4, 1982, a petition for delinquency was filed against J.W. accusing him of possessing not more than 20 grams of marijuana. (R.1). On December 9, 1982, the respondent filed a motion to suppress. The facts are that on September 24, 1982 the assistant principal at Cutler Ridge Junior High School was informed by a student member of Crimewatch that a student, J.W., possessed marijuana. J.W. was searched but marijuana was not found. (T.10). Later, the assistant principal was told by the same student that J.W. had handed the marijuana to J.H. (T.10). The assistant principal confronted J.H. (T.11). Before being asked, J.H. said it wasn't hers. Assistant Principal

McPhaul asked what wasn't hers. J.H. replied that what was in her purse wasn't hers. (T.11). McPhaul asked her to open the purse. J.H. did. Inside were five cigarettes which appeared to be marijuana. (T.11-12). McPhaul had her close the purse and he called the police. (T.11). McPhaul never touched the purse's contents. (T.16). Police officer Hackett actually seized the marijuana. (T.19). J.H. later said J.W. had given the marijuana to her to hide in her purse. (T.21). The respondent asserted that the information was insufficient to make the informant reliable and that the fruits of the search and her statements ought therefore be suppressed. (T.29-30). The court granted the respondent's motion to suppress. (T.30). The State appealed. The Third District Court of Appeal granted the respondent's motion to dismiss on April 28, 1983. On October 27, 1983, the Third District Court of Appeal denied the State's motion for rehearing and certified the following question to this Court:

> 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?

This Court ordered a response in light of State v. C.C. and State v. G.D.P.

POINT ON APPEAL

WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN REFUSING TO TREAT THE STATE'S APPEAL AS A PETITION FOR WRIT OF CERTIORARI WHERE THERE WAS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY THE TRIAL COURT.

SUMMARY OF THE ARGUMENT

The trial court herein departed from the essential requirements of the law by holding that the confidential informant had to prove reliable enough to establish probable cause to search J.H.'s purse. The Court, in New Jersey v. T.L.O., ___U.S.___, 105 S.Ct. 733 (1984), held that the legality of a search of a student should depend simply upon th reasonableness, under all of the circumstances, of the search. The facts in this case clearly show that the assistance principal acted reasonably in approaching J.H. Once having approached J.H., J.H. gave every indication that there was something in her purse which was illegal. The assistant principal acted reasonably under the circumstances in asking her to open her purse, which revealed the marijuana. J.H. then made a statement implicating J.W. J.W. did not have standing to contest either the marijuana found in J.H.'s purse or J.H.'s statement.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED IN REFUSING TO TREAT THE STATE'S APPEAL AS A PETITION FOR WRIT OF CERTIORARI.

Initially, the State argues that the Respondent has no standing to contest the marijuana and J.H.'s statement implicating him. J.W. had no expectation of privacy in J.H.'s purse. He therefore lacks standing to suppress any contraband found therein. Rawlings v. Kentucky, 448 U.S. 98, 100 S.CT. 2556 (1980). Additionally, J.H.'s statement was valid evidence against J.W. clearly implicating him in the crime. J.W. therefore totally lacked standing to suppress either the marijuana found in J.H.'s purse or the statements made by J.H. The trial court's conclusions to the contrary departed from the essential requirements of the law. The trial court therefore departed from the essential requirements of the law by applying the wrong standards.

The school official in this case acted reasonably. An informant told him that marijuana which had been possessed by J.W. was now possessed by J.H. The assistant principal approached J.H. who immediately blurted out that what was in her purse was not hers. This gave the assistant principal reasonable grounds to request that J.H. open her purse. The marijuana was in plain sight once the purse was opened.

ARGUMENT

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Although the informant's information did not have the indicia of reliability commonly associated with probable cause, the invasion of the student's privacy was limited and therefore reasonable under the totality of the circumstances. This is particularly true in light of the fact that the assistant principal had only confronted J.H. when she voluntarily blurted out a statement which indicated that contraband may have been in her purse. In New Jersey v. T.L.O., supra at 746, the Supreme Court stated:

> A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes. her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes was not an "inchoate and unparticularized suspicion or hunch." Terry v. Ohio, 392 U.S., at 27, 88 S.Ct., at 1883....

So in this case, the assistant principal had more than inchoate and unparticularized suspicion or hunch. He had reason to believe J.H. had the marijuana. He acted reasonably in asking J.H. to open her purse to verify whether this was true. The search was therefore proper. The search led to the marijuana which led to J.H.'s statement implicating J.W. All of it was proper evidence.

The trial court departed from the essential requirements of the law by applying the wrong standard and by then arriving at the wrong conclusion.

Since the requirements for common-law certiorari could clearly have been met in the case sub judice, the Third District Court of Appeal erred in entering an order of dismissal before determining whether the trial court had departed from the essential requirements of the law.

The Constitution of the State of Florida, Art. V, §4(b)(1) (1968), provides for appellate and extraordinary writ jurisdiction in the district courts of appeals, as follows:

> (b) JURISDICTION.
> (1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

Art. V, §4(b)(3) states:

> ....A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

It has long been settled that an appeal that is 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 has held that it, not the legislature, has the sole discretion under the Constitution to decide what appeals may be taken, including interlocutory orders. In Interest of R.J.B., 408 So.2d 1048 (Fla. 1982). Therefore, improvident appeals can be treated as petitions for certiorari, since all appellate review is by appeal except where review by certiorari is permitted. 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).

Recent cases from this Court have indicated that, in certain classes of actions, the State has no right to appeal

and no right to petition the appellate courts for certiorari. 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). These cases appear to hold that this Court does not determine the State's right to appeal on the grounds that such right is purely statutory. State v. C.C., 10 F.L.W. 435 (Fla. Aug. 30, 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 as a matter of right. 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). In accordance with Justice Boyd's concurring opinion in Jones, it is asserted that this Court did not overturn the well-established common-law writ of certiorari by holding that when there is no entitlement to appeal certiorari is ipso facto not available as a remedy. Instead, it is asserted that this court found that the situations presented did not meet the standards for common-law certiorari and were therefore not reviewable by that method. This interpretation is consistent with the

holdings that constitutional definitions of jurisdiction of courts control and certiorari may issue to review a judgment 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, throughout the previous decades, on the subject. Where it clearly appears that there is no adequate or complete remedy by appeal, the court will consider granting a writ of certiorari. Brooks v. Owens, 97 So.2d 693 (Fla. 1957). Certiorari is a discretionary writ and is available to obtain review in situations when no other method of appeal is available. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). 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 clearly apparent that there has been a departure from the essential requirements of law, and the petitioner does not have a full and adequate remedy by appeal after judgment. Shell v. State Road Department, 135 So.2d 857 (Fla. 1961). 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).

Certiorari is not a substitute for appeal. See, Lewis v. Lewis, 78 So.2d 711 (Fla. 1955). 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). It may not be used to challenge findings of fact unless the fact-finding process had been marred by a departure from essential procedural requirements. Chicken 'N' Things v. Murray, 329 So.2d 302 (Fla. 1976). Certiorari has been specifically held to be the appropriate vehicle for testing the correctness of orders governing discovery procedures. Greyhound Lines, Inc. v. Jackson, 445 So.2d 1107 (Fla. 4th DCA 1984); City of Williston v. Roadlander, 425 So.2d 1175 (Fla. 1st DCA 1983).

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

CONCLUSION

Based upon the foregoing statements of fact and citations of law, the trial court departed from the essential requirements of the law. The order of the trial court granting the motion to suppress must be reversed.

Respectfully submitted,

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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 RORY S. STEIN, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33128, on this 15th day of November, 1985.

JACK B. LUDIN
Assistant Attorney General

/vbm