IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 64,471

CHAPMAN LEVI CREIGHTON,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904)488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO. 64,471
CHAPMAN LEVI CREIGHTON,)
Respondent.)
)

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent was the appellee in the First District and the defendant in the trial court. The parties will be referred to as they appear before this Court. Attached to this brief, pursuant to Florida Rule of Appellate Procedure 9.220, necessary to an understanding of the issues presented, is Appendix A, which contains Respondent's post-trial motion for a judgment of acquittal; Appendix B, a transcript of the hearing on Respondent's motion; Appendix C, Respondent's motion to quash state appeal; Appendix D, Petitioner's response; and Appendix E, opinion of the First District filed October 14, 1983.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts, and directs this Court's attention to Appendix B, which shows that the trial court granted Respondent's post-trial motion for a judgment of acquittal due to insufficient evidence:

> I really think the evidence is just not sufficient to sustain a conviction on the second count (Appendix B-8).

III ARGUMENT

ISSUE

THE FIRST DISTRICT'S DISMISSAL OF THE STATE'S APPEAL WAS CORRECT BECAUSE A STATE APPEAL FROM AN ORDER GRANTING A MOTION FOR A JUDGMENT OF ACQUITTAL DUE TO INSUFFICIENT EVIDENCE IS NOT RECOGNIZED BY STATUTE OR COURT RULE AND BECAUSE TO ALLOW THE STATE TO REINSTATE THE VERDICT WOULD BE A VIOLATION OF RESPONDENT'S RIGHT AGAINST DOUBLE JEOPARDY (ISSUE RE-STATED BY RESPONDENT).

In Florida, an appeal by the state must be expressly authorized by statute or court rule in order to be recognized as a proper appellate proceeding. Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947); Crownover v. Shannon, 170 So.2d 299 (Fla. 1964); State v. Smith, 260 So.2d 489 (Fla. 1972); Clement v. Aztec Sales, 297 So.2d 1 (Fla. 1974); State v. Budnick, 237 So.2d 825 (Fla. 2d DCA), cert. den. 240 So.2d 638 (Fla. 1978); State v. Bale, 345 So.2d 862 (Fla. 2d DCA 1977); State v. I.B., 366 So.2d 186 (Fla. 1st DCA 1979); and State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981).

Section 924.07, Florida Statutes, provides:

> 924.07 Appeal by state. - The state may appeal from:
> (1) An order dismissing an indictment or information or any count thereof;
> (2) An order granting a new trial;
> (3) An order arresting judgment;
> (4) A ruling on a question of law when the defendant is convicted and appeals from the judgment;
> (5) The sentence, on the ground that it is illegal;
> (6) A judgment discharging a prisoner on habeas corpus;
> (7) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure; or

(8) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.

Such appeal shall embody all assignments of error in each pretrial order that the state seeks to have reviewed. The state shall pay all costs of such appeal except for the defendant's attorney fee.

Section 924.071, Florida Statutes, provides:

924.071 Additional grounds for appeal by the state; time for taking; stay of cause. -

(1) The state may appeal from a pretrial order dismissing a search warrant, suppressing evidence obtained by search and seizure, or suppressing a confession or admission made by a defendant. The appeal must be taken before the trial.

(2) An appeal by the state from a pretrial order shall stay the case against each defendant upon whose application the order was made until the appeal is determined. If the trial court determines that the evidence, confession, or admission that is the subject of the order would materially assist another defendant and that the prosecuting attorney intends to use it for that purpose, the court shall stay the case of that defendant until the appeal is determined. A defendant in custody whose case is stayed either automatically or by order of the court shall be released on his own recognizance pending the appeal if he is charged with a bailable offense.

The appellate rules largely track the statutes:

(c) Appeals by the State.

(1) Appeals Permitted. The State may appeal an order:

(A) Dismissing an indictment or information or any count thereof;

(B) Suppressing before trial confessions, admissions or evidence obtained by search and seizure;

(C) Granting a new trial;

(D) Arresting judgment;

(E) Discharging a defendant pursuant to Fla. R. Crim. P. 3.191;

(F) Discharging a prisoner on habeas corpus;

(G) Adjudicating a defendant incompetent or insane;

(H) Ruling on a question of law when a convicted defendant appeals his judgment of conviction; and may appeal

(I) An illegal sentence.

Florida Rule of Appellate Procedure 9.140(c)(1).

Since Florida Rule of Criminal Procedure 3.380(c) expressly authorizes a trial judge to grant a post-trial motion for a judgment of acquittal due to insufficient evidence, and no statute or rule authorizes a state appeal therefrom, the state cannot appeal such an order. Balikes v. Speleos, 173 So.2d 735 (Fla. 3d DCA 1965).

In State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976), the trial judge granted a post-trial judgment of acquittal and the state purportedly took an appeal. The First District, as in the instant case, found the state's appeal from a final judgment of acquittal was not authorized by statute, and could not be construed as an appeal from an order dismissing an indictment or information by any "such tortuous construction" of Section 924.07(1), Florida Statutes.

In addition to being precluded from taking an appeal from a judgment of acquittal by statute and rule, the state is also barred by double jeopardy principles. A defendant cannot be again

placed in jeopardy after a trial or appellate court finds that there was insufficient evidence to support the conviction. Burkes v. United States, 437 U.S. 1 (1978); Greene v. Massey, 437 U.S. 19 (1978); United States v. Scott, 437 U.S. 82 (1978); Hudson v. Louisiana, 450 U.S. 40 (1981); and Tibbs v. Florida, 457 U.S. 31 (1982). In Watson v. State, 410 So.2d 207 (Fla. 1st DCA 1982), the trial judge granted a judgment of acquittal as to one count of aggravated battery after the state rested. The following morning, the state asked the court to reinstate the charge and the court complied. On appeal, the First District, citing United States v. Scott, supra, held that the reinstatement of the charge violated Watson's right against double jeopardy.

In summary, then Respondent contends that the state may not appeal from a post-trial motion for judgment of acquittal where it is based upon insufficient evidence. Such an appeal is not authorized by statute or court rule and would run afoul of the prohibition against double jeopardy. This Court must affirm the order of the First District.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Respondent requests that the order of the First District be affirmed.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand-delivered to Mr. Gregory C. Smith, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 28 day of November, 1983.

P. DOUGLAS BRINKMEYER