IN THE SUPREME COURT OF FLORIDA

CLYDE McPHADDER, :

Appellee/Petitioner, :

vs. : CASE NO. 65,724

STATE OF FLORIDA, :

Appellant/Respondent, :

_____ :

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR ALACHUA COUNTY, FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

MICHAEL E. ALLEN
PUBLIC DEFENDER

MICHAEL J. MINERVA
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLEE/PETITIONER

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JURISDICTIONAL BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

Petitioner will designate references to the documents in the appendix by the symbol "A".

II STATEMENT OF THE CASE AND FACTS

The state appealed an order of the trial court striking statements made by an informant, Mae Campbell, on electronic recordings taped during three purported drug transactions in which the petitioner allegedly was present. The trial judge ruled that the informant, who would not be present as a witness at the trial, would be unavailable and therefore the statements she made on the tape recording would not be admissible against petitioner (A-1-3).

On appeal the petitioner argued that the court did not have jurisdiction to consider the state's appeal, citing Fla. R.App.P. 9.140(c)(1)(B) which allows the state to appeal non-final orders "suppressing", pre-trial, evidence "obtained by search and seizure". The First District Court of Appeal rejected this argument stating:

> We first address a jurisdictional question raised by appellee. Contrary to the contention of appellee, we find that pursuant to rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure, the state had properly raised its issue by appeal at this time. To preclude the state from bringing this appeal would undermine the rationale for the rule since the state would be unable to raise the question after trial if a verdict was entered in favor of appellee. The rule provides, in pertinent part:
>
> > (1) Appeals permitted. The state may appeal an order:
> >
> > (A) ***
> >
> > (B) Suppressing before trial confessions, admissions or evidence <u>obtained</u> by search and seizure;
> >
> > ***(Emphasis supplied)
>
> Although the question on appeal is not one

> involving a search and seizure issue, the evidence which was the subject of the order appealed was "obtained by search and seizure" and was suppressed before trial. Therefore, despite the procedural treatment of a similar appeal as a petition for writ of certiorari by our sister court in State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982), we find this question reviewable on direct appeal pursuant to rule 9.140(c)(1)(B). (A-2)

A timely motion for rehearing was denied by the District Court on July 26, 1984 (A-4).

QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT DISCRETIONARY REVIEW TO RESOLVE THE DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF THE FIRST DISTRICT IN PETITIONER'S CASE AND THAT OF THE THIRD DISTRICT IN STATE v. STEINBRECHER, 409 So.2d 510.

This Court has jurisdiction under Article V, Section 3 (b)(3) to review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal . . . on the same question of law."

The District Court of Appeal in this case ruled that a pre-trial order striking evidence proposed to be used by the state could be appealed under Florida Appellate Rule 9.140(c)(1)(B) as an order:

> Suppressing before trial confessions, admissions or evidence obtained by search and seizure;

The same point of law was decided by the Third District Court of Appeal in State v. Steinbrecher, 409 So.2d 510 (Fla. 3rd DCA 1982) and the Court held that a similar pre-trial order could not be appealed by the state. The defendant in Steinbrecher filed and the Court granted a pre-trial motion to exclude tape recordings of conversations on grounds of the unintelligibility of the tape. The District Court ruled that because the ruling of the trial judge was based upon that ground and "did not involve issues of suppression of pre-trial confessions, admissions or evidence obtained by search and seizure" the order was not appealable. Id., at 510, 511.

The same situation existed in petitioner's case. The order which the state sought to appeal was not one of suppression because it was not a ruling on the validity of a search and seizure and did not apply the exclusionary rule as a sanction for violating the petitioner's right to be free from illegal searches and seizures. The District Court in petitioner's case recognized that its ruling was contrary to the "procedural treatment of a similar appeal" in Steinbrecher (A-2).

In Steinbrecher, supra, the Court ruled that the state could obtain review of the challenged order by certiorari. In petitioner's case the First District ruled that an appeal was the proper procedural vehicle. There is, of course, a difference between the kind of review obtainable under certiorari as distinguished from appeal. Combs v. State, 436 So.2d 93 (Fla. 1983). There the Court said:

> In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. 436 So.2d at 95, 96.

The First and Third District Courts of Appeal are in disagreement over the procedure for the state to obtain review of a pre-trial order which prevents the state from using evidence not challenged on the basis of an illegal search and

seizure. The ruling of the First District is that if the evidence was obtained by search and seizure the state may appeal even if the issue is not one involving search and seizure. The Third District holds expressly to the contrary, and grants only certiorari review when the evidence is ruled inadmissible because of an evidentiary ground. The distinction between the full review available on appeal as opposed to the more restrictive review available under common-law certiorari is one which this Court should clarify.

Petitioner urges this Court to accept jurisdiction and resolve the conflict between the First and Third District Courts on the scope of review available when the state appeals a pre-trial order ruling evidence inadmissible on a ground unrelated to search and seizure.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER

MICHAEL J. MINERVA
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLEE/PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U.S. mail to Mr. Clyde McPhadder, 909 Northeast 25th Terrace, Gainesville, Florida 32601, on this 17th day of August, 1984.

MICHAEL J. MINERVA