65,964

IN THE SUPREME COURT OF FLORIDA

CASE NO.

RENE RAMOS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

The Petitioner, Rene Ramos, was the Defendant in the trial court and is the Appellant/Cross-Appellee in the Third District Court of Appeal. The Respondent, The State of Florida, was the prosecution in the trial court and is the Appellee/Cross-Appellant in the Third District Court of Appeal. The parties will be referred to either by name or as they stood before the trial court. The symbol "App." will refer to the Petitioner's appendix attached to this brief.

STATEMENT OF THE FACTS

The Defendant was convicted of first degree murder by a jury. Thereafter, upon motion for new trial, and motion for reduction of sentence, the trial court set aside the conviction and found defendant guilty of second degree murder as follows:

> "ORDERED and ADJUDGED, That the jury verdict as to the charge of First Degree Murder is set aside and a Judgment of Acquittal as to the charge of First Degree Murder is entered, and a finding of guilt as to the lesser included offense of Second Degree Murder is hereby entered, upon a finding by this Court that the evidence presented at the trial of this cause failed to prove beyond every reasonable doubt that the Defendant, a man with no prior criminal past, acted with premeditation uninfluenced or uncontrolled by a dominating passion." (App.2) (citations omitted)

Defendant appealed his conviction of second degree murder and the state cross-appealed the trial court's ruling on the motion for reduction. (App.1-2) Defendant moved to dismiss the state's cross-appeal. The Third District denied the motion to dismiss with an opinion (App.1-5)

The Third District held the trial court's ruling that the evidence on premeditation was insufficient to sustain the conviction was a question of law, and, therefore, the state could cross-appeal the acquittal pursuant to Section 924.07(e) Florida Statute 1983, and Florida Rules of Appellate Procedure 9.140(c)(1)(H)(App.2).

It is this aspect of the court's opinion which the defendant seeks to have this Court review as being in direct and express conflict with decisions by other district courts of appeal and by this Court.

Notice to Invoke Discretionary Review was timely filed on September 27, 1984.

The case is currently pending in the Third District Court of Appeal. Petitioner's Motion to Stay the Proceedings is pending.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH KIRKSEY vs. STATE, 433 So.2d 1236 (1st. DCA 1983)

The defendant submits that the Third District Court of Appeal, in denying defendant's motion to dismiss the cross-appeal of the State has misconstrued the true nature of the trial court's action and has afforded the State a broader right of appeal where the defendant appeals his conviction, than was intended by Section 924.07(4) Florida Statute.

The ruling of the trial court was on the issue of premeditation, an issue which is proved primarily by circumstantial evidence of the acts of the defendant. The trial court in considering the motion, necessarily weighed the evidence before it on the issue of premeditation and made a factual determination on the issue of intent. This is permissible under Rule 3.600 (a) (2) of the Florida Rules of Criminal Procedure. The question of law regarding the sufficiency of the evidence to sustain the first degree murder conviction, only followed the fact finding phase of the court's function.

Under identical circumstances, the First District Court of Appeal, in Kirksey vs. State, 433 So.2d 1236 (1st DCA 1983), considered the issue:

> We turn now to the State's cross appeal. Pursuant to Rule 3.620, Florida Rules of Criminal Procedure, the trial court ruled

> at sentencing, in lieu of a new trial, that the evidence did not sustain the verdict of kidnapping but was sufficient to sustain a finding of the lesser offense of false imprisonment. The State would now appeal that ruling on the basis of Rule 9.140(c)(1)(H), Florida Rules of Appellate Procedure, which permits the state to appeal an order, "[r]uling on a question of law when a convicted defendant appeals his judgment of conviction..." We hold, however, that a ruling pursuant to Rule 3.620 is one of fact, not of law, and from which the state has no right of appeal under the rules. Accordingly, we now grant appellant's motion to dismiss the cross appeal, which motion was earlier ordered to be carried with the merits.

The trial court in the present case was considering a motion pursuant to Rule 3.620 in conjunction with a new trial motion.

The appropriateness of the Kirksey view is butressed by Tibbs vs. State, 397 So.2d 1120 (Fla. 1981), when the court stated:

> At the trial level, the weight-sufficiency distinction is apparent in our Rules of Criminal Procedure. We noted in McArthur v. Nourse, 369 So. 2d 578 (Fla. 1979) that:
>
> [a] critical distinction has existed at least since 1967, when rules 3.380 (formerly 3.660) and 3.600 of the Florida Rules of Criminal Procedure were adopted. Rule 3.380(a)provides that a motion for judgment of acquittal should be granted if, at the close of the evidence. "the court is of the opinion that the evidence is insufficient to warrant a conviction." In contrast, rule 3.600(a)(2) provides that a motion for new trial shall be granted if the jury verdict is "contrary to law or the

> weight of the evidence."
> Id. at 580 (footnote omitted) (emphases added)
> Rule 3.600(a)(2) thus enables the trial judge to weigh the evidence and determine the credibility of witnesses so as to act, in effect, as an additional juror. It follows that a finding by the trial that the verdict is against the weight of the evidence is not a finding that the evidence is legally insufficient.

Tibbs vs. State 397 So.2d 1120 (Fla. 1981) Footnotes 9 to the opinion.

The Third District relied upon Mixon vs. State, 59 So. 2d 38, (Fla. 1952), as authority for permitting the state cross-appeal under Section 924.07(4). The Mixon opinion granted a state cross-appeal under Section 924.07(4) on the issue of the trial court reducing a conviction from second degree murder to manslaughter. However,there is no indication in Mixon whether the right of the state to appeal was challenged in that case or whether the Court considered the issues.

Additionaly, State vs. Mixon, supra, was decided before Tibbs vs. State, supra and McArthur vs. Nourse, 369 So.2d 578 (Fla. 1979). These cases emphasize the fact finding nature of the trial courts function in weighing evidence. It is respectfully submitted that Mixon vs. State has lost its meaning in the context of a ruling on premeditation pursuant to Rule 3.620, of the Florida Rules of Criminal Procedure.

One judge on the Third District panel would have granted the motion to dismiss on constitutional grounds were it not for Mixon vs. State, (Judge Baskin's concuring

opinion, App.5)

Defendant believes the court should accept jurisdiction of this case for additional reasons. There is no direct right of appeal by the state on a judgment of acquittal. Watson v. State, 410 So.2d 207 (1st DCA 1984). Permitting the appeal on a cross-appeal of defendant's appeal, serves to broaden the rights of appeal by the state where the defendant exercises a fundamental right and thus chills the right to appeal. North Carolina vs. Pearce, 395 U.S. 711, 89 S.Ct. 2072 (1969)

Second, Chapter 924 of the Florida Statutes, which provides for appeals in criminal cases must be read in pari materia with the pertinent portions of the Florida Criminal Code. F.A. 775.021 (1) provides:

> "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

A reasonable construction of F.S. 924.07(4) under these circumstances is that the "rulings of law" contemplated by the legislature should relate to issues which may come up on re-trial of the conviction appealed. Had the legislature intended the state a right to appeal a judgment of acquittal, they could have and would have given it the right expressly, as was done with other types of state appeals.

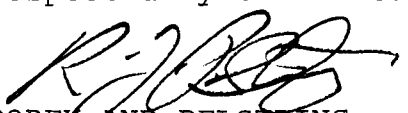
Counsel would also point out that this Court is currently considering the States right of appeal in State vs. J.M, et al., case No. 64-395-403.

It is petitioners belief that the court should exercise discretionary jurisdiction now because the Third District is applying a different rule of law than the First District and will follow it unless this Court rules otherwise.

CONCLUSION

Based upon the foregoing facts argument and case law petitioner respectfully requests the Court to exercise discretionary jurisdiction to consider this appeal on the merits.

Respectfully submitted,



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CERTIFICATE OF SRVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mail served this 5th day of October, 1984 to: Office of the Attorney General, 401 N.W. 2 Avenue, Miami, FL 33128.

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