OA 4-9-85 017

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 15 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

CASE NO. 65,964

RENE RAMOS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, Rene Ramos, was the appellant in the Third District Court of Appeal and the defendant in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent, the State of Florida, was the appellee and the prosecution in those same courts. The parties shall be referred to as petitioner and respondent in this brief.

References to the record on appeal will be designated by the letter "R". References to the transcript of proceedings will be designated by the letter "T".

STATEMENT OF THE CASE

On October 28, 1982, a Dade County Grand Jury charged the petitioner, Rene Ramos, with first degree murder and aggravated assault. (R.1-2). A plea of not guilty was subsequently entered on his behalf.

Trial commenced on February 8, 1983. At the close of the State's case, the petitioner moved for a judgment of acquittal on the charge of first degree murder and reduction of that count to second degree murder. The trial court reserved ruling on the motions. The trial court denied the same motions at the close of all evidence.

The jury returned a verdict of guilty on both the first degree murder count and the aggravated assault count.

When the petitioner again filed a motion for judgment of acquittal after the jury verdict, the trial court granted the motion and reduced the petitioner's conviction for first degree murder to second degree murder. (R.121).

The petitioner timely filed a notice of appeal (R.120) and the State timely filed a notice of cross-appeal. (R.122).

On April 16, 1984, the petitioner filed his initial brief in the Third District Court of Appeal. At the same time, the petitioner submitted a motion to dismiss the cross-appeal of the State. After State response, the Third District Court of Appeal denied the motion. Ramos v. State, 457 So.2d 492 (Fla. 3d DCA 1984). Concluding that the trial court's post-verdict acquittal was a question of law and that consideration of the issue not barred by double jeopardy, the Third District Court of Appeal held that the State was entitled to review pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(H). Ramos v. State, supra, 457 So.2d at 493-494.

After denial of his motion for rehearing, motion for

rehearing en banc, and motion for certification to this court, the petitioner filed a notice to invoke discretionary jurisdiction. Because the Third District denied the petitioner's motion to stay, matters in the district court of appeal continued.

Oral argument in the Third District Court of Appeal was held on January 15, 1985. During the argument, a new panel questioned both parties about the State's ability to cross-appeal. The chief judge suggested that the petitioner contemplate filing a conditional notice of voluntary dismissal, thereby frustrating the State in its effort to obtain appellate review.

Following the chief judge's suggestion, the petitioner filed a conditional dismissal of appeal and suggestion of lack of jurisdiction on January 16, 1985. In that pleading, the petitioner suggested that he would dismiss his appeal expressly conditioned upon a ruling from the Third District Court of Appeal that dismissal would divest the court of jurisdiction to entertain the State's cross-appeal.

In response, the State moved to strike the notice of conditional dismissal and responded to the suggestion of lack of jurisdiction. The State argued that the Third District Court of Appeal could not render an advisory

opinion on the issue. The State further contended that dismissal would not divest the court of jurisdiction to hear the State's cross-appeal and that the State could have obtained review of the trial court's post-verdict judgment of acquittal through other appellate vehicles.

Prior to a ruling on this issue, this court accepted jurisdiction.

STATEMENT OF THE FACTS

During the evening hours of October 7, 1982, Daniel Enrique Paneque died as a result of a knife wound inflicted by the petitioner at the Malaga Restaurant, 740 S.W. 8th Street, Miami, Dade County, Florida. The State submitted that the actions of the petitioner established the crime of premeditated murder. The defense, however, contended that the petitioner should have been acquitted on self-defense grounds or convicted of a lesser included offense.

Ada Ramos married the petitioner in Cuba in 1976. In 1981, the petitioner and his wife came to Florida to live. (T.69). The victim, Daniel Panequ, was a friend of the family. (T.74).

After a period of time, the marriage deteriorated and

Ada Ramos filed for divorce in July, 1982. (T.104). During the period of separation between July and September, the petitioner often visited his wife and child, talked of their separate futures, and even agreed that remarriage would be best for Ada Ramos. (T.75).

In August and September, the victim maintained a close relationship with Ada Ramos. (T.106-110). Indeed, the petitioner and the victim argued about this subject in late August. (T.106).

In mid-September, the appellant took a twelve day trip to New Jersey. Prior to his departure, however, the petitioner was well aware that Ada Ramos was dating the victim. (T.76, 268, 288). When the petitioner returned from his New Jersey trip, he was informed that Ada Ramos loved the victim and that they were to be married at the end of the year. (T.76-77).

On October 7, at approximately 7:00 p.m., the petitioner telephoned Ada Ramos. The petitioner stated that he was going to come to Ada Ramos' house to visit his child.

Although Ada Ramos told him that he would not be permitted to enter, the petitioner simply hung up. (T.77-78).

Approximately 7:30 p.m., the petitioner arrived. The

petitioner entered the residence as Ada Ramos' uncle began to leave the apartment. As the petitioner entered, Ada Ramos told her uncle not to leave. (T.79).

Approximately 7:30 p.m., the petitioner arrived. The petitioner entered the residence as Ada Ramos' uncle began to leave the apartment. As the petitioner entered, Ada Ramos told her uncle not to leave. (T.79).

The petitioner began to argue, use obscene words in reference to the victim, and insulted Ada Ramos. The petitioner then grabbed Ada Ramos by the neck, and pulled a pocketknife that he had brought from New Jersey. The petitioner then stated, "I'm going to kill you." (T.79-80).

At that point, the petitioner's daughter entered the room and said, "Do not kill my mommy." (T.80). The petitioner put the pocketknife away, hugged his little girl, and began to cry. Both the petitioner and his child went outside the front door.

After a short period of time, the girl was called inside by her mother and Adas Ramos closed the door. The petitioner then began to shout obscenities again and said, "I'm going to kill him. I'm going to kill him." (T.81). The petitioner then left at approximately 8:00 p.m. (T.86).

The petitioner next drove to the Malaga Restaurant and arrived at approximately 8:15 p.m. (T.195). The petitioner entered the restaurant, quickly moving toward the victim. The victim, seated with his back to the door, received a wound from the knife with which the defendant had previously threatened his wife. (T.195-229). The victim had no weapons nor made any furtive movements. (T.199).

After the petitioner attacked the victim, he stepped back and wiped off the knife as he exited the restaurant door. (T.200-210). The petitioner entered his car and drove away. (T.201-202).

ISSUE ON APPEAL

WHETHER THE STATE OF FLORIDA MAY OBTAIN APPELLATE REVIEW OF A POST-VERDICT JUDGMENT OF ACQUITTAL.

SUMMARY OF THE ARGUMENT

Florida Rule of Appellate Procedure 9.140(c)(1)(H) and Section 924.07(4), Florida Statutes (1983), expressly authorize the State of Florida to obtain appellate review on a "ruling on a question of law" when a defendant appeals his judgment of conviction. It cannot be reasonably suggested that a trial court's ruling on a motion for judgment of acquittal is anything but such a question of law. As such, the Third District Court of Appeal was eminently correct in denying the petitioner's motion to dismiss the State's cross-appeal.

The petitioner's reliance on Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983), pet. for rev. den., 446 So.2d 100 (Fla. 1984), and its construction of Florida Rule of Appellate Procedure 3.620 is clearly misplaced. Rule 3.620 permits the trial court, on a motion for new trial, to reduce a finding of guilt to a lesser necessarily included offense where the evidence in the opinion of the trial judge is insufficient to support the verdict. Because the trial court is permitted under Rule 3.620 to sit as a trier of fact, the decision does not conflict with the ruling in the present case or the numerous decisions governing motions for judgment of acquittal.

Independent of the authorization in Florida Rule of

Appellate Procedure 9.140(c)(1)(H) and Section 924.07(4), Florida Statutes (1983), the State may obtain appellate review pursuant to Florida Rule of Appellate Procedure 9.110(g), Florida Rule of Appellate Procedure 9.110(a), State v. McInnes, 133 So.2d 581 (Fla. 1st DCA 1961), State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), and State v. McKinney, 212 So.2d 761 (Fla. 1968). The rules in these cases permit cross-appeal so long as it arose from the same order in the same prosecution. Here, each party sought review from the trial court's judgment of conviction. Under such circumstances, the Third District properly entertains the State's cross-appeal.

The petitioner also argues that the State should be prohibited from seeking review under the circumstances of this case because it creates a "chill" of the petitioner's right to seek review himself. The main flaw in the petitioner's rationale is that the State could not have otherwise obtained review without the petitioner's appeal. As will be seen, the State possesses a constitutional right to appeal under Article V, Section 4(b)(1), Florida Constitution. The State could have also obtained direct review by recharacterization on the trial court order to fall within Florida Rule of Appellate Procedure 9.140(c)(1)(A), or by common law certiorari.

The recurrent theme of the petitioner's argument is that the State's right to appeal is purely statutory. Although a number of decisions in recent years has suggested such a proposition, see, State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983); State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983); State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976), they clearly and explicitly conflict with this court's opinions in State v. Smith, 260 So.2d 489 (Fla. 1972), and Crownover v. Shannon, 170 So.2d 299 (Fla. 1964). An historical analysis of the decisions which have caused the confusion and the constitutions under which they were decided once and for all makes clear that the right to appeal is constitutional in nature, not statutory.

Finally, the petitioner suggests that the State's appeal should be dismissed because double jeopardy precludes review of an acquittal. The argument, however, is overly broad. Close scrutiny of the applicable law and the facts of this case plainly demonstrates that the Third District Court of Appeal's ability to grant relief upon the exercise of its jurisdiction is unimpeded.

ARGUMENT

THE STATE OF FLORIDA MAY OBTAIN APPELLATE REVIEW OF A POST-VERDICT JUDGMENT OF ACQUITTAL.

The opinion of the Third District Court of Appeal in the present case correctly concluded that the State could a review by cross-appeal pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(H) and Section 924.07(4), Florida Statutes (1983). A ruling on a motion for judgment of acquittal is plainly a question of law subject to review. This brief will examine the authority which clearly supports the State's right to obtain review of such an order and will address the attacks by petitioner on the soundness and advisability of such a position.

A. Cross-Appeal by Fla.R.App.P. 9.140(c)(1)(H) and Section 924.07(4), Fla.Stat. (1983)

Both Florida Rule of Appellate Procedure 9.140(c)(1)(H) and Section 924.07(4), Florida Statutes (1983), provide that the State may appeal an order ruling on a question of law when a convicted defendant appeals his judgment of conviction. The petitioner argues that a motion for judgment of acquittal is a question of fact which falls outside the scope of the rule and statute. A brief examination of the law relating to motions for judgment of acquittal makes

clear that the petitioner's argument is erroneous.

Florida Rule of Criminal Procedure 3.380 provides in pertinent part:

> If, at the close of the evidence for the State or at the close of all evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant, shall, enter a judgment of acquittal.

The test to be applied on a motion for judgment of acquittal is not whether in the opinion of the court the evidence failed to exclude every reasonable hypothesis but that of guilt, but rather whether a jury was required to reasonably so conclude. Indeed, courts are precluded from weighing the evidence and rendering a judgment as trier of fact under Florida Rule of Criminal Procedure 3.380. Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 102 S.Ct. 2211 (1982). This court succintly addressed the test on a motion for judgment of acquittal in Lynch v. State, 293 So.2d 44 (Fla. 1974):

> A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable

> to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge. The credibility and probative force of conflicting testimony should not be determined on a motion for judgment of acquittal.
>
> Lynch v. State, supra, 293 So.2d at 45.

Both Tibbs and Lynch make clear that the trial court is not to act as a trier of fact. Its role pursuant to a motion for judgment of acquittal under Florida Rule of Criminal 3.380 is to accept all facts adduced and inferences therefrom in a light most favorable to the State. Courts may grant a motion for judgment of acquittal only where the evidence, taken as true, cannot support a conviction as a matter of law. McGahee v. Massey, 667 F.2d 1357 (11th Cir. 1982); Fletcher v. State, 428 So.2d 667 (Fla. 1st DCA 1982); Rodriguez v. State, 436 So.2d 219 (Fla. 3d DCA 1983); Muwwakil v. State, 435 So.2d 304 (Fla. 3d DCA 1983); Adams v. State, 189 So. 397 (Fla. 1939).

This court was presented with the identical facts in

the case of Mixon v. State, 59 So.2d 38 (Fla. 1952). Mixon was charged with second degree murder and convicted after a jury trial. The trial court granted a post-trial motion to reduce and found Mixon guilty of manslaughter. Mixon appealed his manslaughter conviction and the State cross-appealed the trial court's reduction of the second degree murder verdict.

On review, this court concluded that the errors raised by Mixon did not warrant reversal. This court further held that the trial court incorrectly reduced Mixon's second degree murder conviction:

> The law is quite clear that one may not provoke a difficulty and having done so act under the necessity produced by the difficulty, then kill his adversary and justify the homicide under the plea of self-defense.
>
> We think that was the position the appellant got himself in and that this view was adopted by the jury when they found him guilty of the higher offense, murder in the second degree.
>
> So, we conclude that the judge committed no error in rejecting the testimony relative to the appellant's physical condition. For the same reason we think the State should prevail on the cross-appeal, taken under Sec. 924.07(4), by which is questioned the action

> by the court in reducing the offense to manslaughter.
>
> Mixon v. State, supra, 59 So.2d at 39-40.[1]

Like Mixon, the trial judge in the present case granted the motion for judgment of acquittal and reduced the conviction to a lesser offense. The trial court did so believing that both Clay v. State, 424 So.2d 1004 (Fla. 3d DCA 1983), and Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983) required such a result. As such, it was a legal conclusion which was wrong and subject to appellate review.

B. The Kirksey Decision and Fla.R.Crim.P. 3.620

To support his argument that a ruling on a motion for judgment of acquittal is one of fact and not law, the petitioner relies on Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983), pet. for rev. den., 446 So.2d 100 (Fla. 1984). In Kirksey, the defendant was convicted of attempted sexual battery, aggravated assault, burglary with assault, and kidnapping. Pursuant to Florida Rule of Criminal Procedure 3.620, the trial court at sentencing, in lieu of a new trial, ruled that the evidence did not sustain the verdict of kidnapping but was sufficient to sustain a finding of the lesser offense of false imprisonment. When the

[1]The petitioner attempts to avoid the plain applicability of the Mixon case by suggesting that nothing in the Mixon opinion demonstrates that the issues raised in the present case were raised in Mixon. Although the petitioner does not so state, this court must reverse Mixon to reverse the Third District Court of Appeal opinion in the present case.

defendant appealed his conviction, the State cross-appealed the trial court's reduction of the kidnapping verdict.

On appeal, the defendant's motion to dismiss the State's cross-appeal was granted:

> The State would now appeal [the reduction of the kidnapping verdict] 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 to appeal under the rules.
>
> Kirksey v. State, supra, 433 So.2d at 1241.

The Kirksey opinion may be distinguished from the present case. Florida Rule of Criminal Procedure 3.620, on which Kirksey was based, provides:

> When the offense is divided into degrees and necessarily includes lesser offenses, and the court, on a motion for new trial, is of the opinion that the evidence does not sustain the verdict but is sufficient to sustain a finding of guilt of a lesser degree or of a lesser offense necessarily included in the one charge, the court shall not grant a new trial but shall find or judge the defendant guilty of such lesser degree or lesser offense necessarily included in the charge, unless a new trial is granted by reason of some other prejudicial error.

A reduction of offense pursuant to Rule 3.620 may occur only in conjunction with a motion for a new trial. State v. Farmer, 384 So.2d 311 (Fla. 5th DCA 1980).[2]

The trial judge in the Kirksey case availed himself of Rule 3.620 because the weight of the evidence was contrary to the kidnapping verdict, but not to the lesser included offense of false imprisonment. Under such circumstances, the First District Court of Appeal was correct to conclude that the decision of the trial court was one of fact, and not law. Any other interpretation of the Kirksey decision would run afoul with numerous cases in this court and the other district courts of appeal.[3]

[2]Florida Rule of Criminal Procedure 3.600(a)(2) provides in part that a new trial shall be granted if the verdict is contrary to law or the weight of the evidence.

[3]Because Rule 3.600(a)(2) provides for a new trial when a verdict is contrary to law and when the verdict is contrary to the weight of the evidence, Rule 3.620 can employed in two separate, though related, areas. First, as previously discussed, a court may find a verdict contrary to the weight of the evidence, but not contrary to a lesser included offense. Instead of a new trial, the court may simply enter judgment on the lesser included offense.

Rule 3.600(a)(2) also provides, however, that a new trial must be granted if the verdict is contrary to law. This requires the trial court to again engage in a determination that the evidence presented, viewed in a light most favorable to the State is insufficient as a matter of law to support the conviction. Under those circumstances, the question is purely one of law and not fact.

This court discussed the relationship between these two concepts in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 102 S.Ct. 2211 (1982). A conviction rests upon insufficient evidence when, even after viewing the evidence

The Third District correctly concluded Florida Rule of Appellate Procedure 9.140(c)(1)(H) and Section 924.07(4), Florida Statutes (1983), permit the State to obtain review of a trial court's post-verdict judgment of acquittal by cross-

appeal when a defendant appeals his judgment of conviction.

C. Alternative Cross-Appeal Review Pursuant to Florida Rule of Appellate Procedure 9.110

Assuming arguendo that a ruling on a motion for judgment of acquittal is an issue of fact and that review by cross-appeal cannot be had pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(H) and Section 924.07(4), Florida Statutes (1983), the State can nonethless obtain cross-appeal review pursuant to Florida Rule of Appellate Procedure 9.110(a). A review of the historical basis for this rule clearly supports the State's position.

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in a light most favorable to the prosecution, no rational fact finder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the court into questions of credibility. The "weight of the evidence" refers to a "determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than another." A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the judge sits as a "thirteenth juror." Id.

It is for this reason that Kirksey must be construed as involving a verdict contrary to the weight of the evidence. If Kirksey involved a verdict contrary to law, Kirksey was incorrectly decided and must be disapproved.

The beginning point of analysis on this issue is the pre-rules decision in State v. McInnes, 133 So.2d 581 (Fla. 1st DCA 1961). In McInnes, the State appealed an order quashing two counts of a four-count information, and the defendant cross-appealed that part of the order denying his motion to quash the remaining counts. The state moved to dismiss the cross-appeal, contending that there was no rule or statute authorizing a defendant to cross-appeal. Addressing this contention, the court noted there was nothing in the rule prohibiting a criminal defendant from taking a cross-appeal and that civil actions permitted cross-appeals. The court then stated that "cross-assignments of error are allowable only when they could have supported a separate and distinct appeal, unless the relate to the same judgment from which the main appeal is taken." State v. McInnes, supra, 133 So.2d at 583 (emphasis supplied). Although the law did not authorize the defendant to take an appeal from the denial of a motion to quash, defendant's cross-appeal of the denial of the motion to quash was permissible "since it relates to the same order from which the State's appeal is taken." Id.

The subsequent history of State v. McInnes indicates that this court gave at least tacit approval to such a proposition. In transferring the case to the district court of appeal on other grounds, this court stated:

> [W]e apprehend that that tribunal may wish to re-dash examine the question relative to the right of the defendant to file a cross-appeal because if the four charges are considered as in effect for distinct prosecution which could proceed independently, under four separate informations, then the defendant for all practical purposes is undertaking to raise by cross-appeal, in appeal properly taken by the State from a decision affecting two counts, or prosecutions, a ruling made in a different and independent prosecution.
>
> State v. McInnes, 140 So.2d 519, 521 (Fla. 1962).

This court found no impediment to the defendant's cross-appeal, so long as it arose from the same order in the same prosecution.

The state of the law has therefore developed into clearly permitting a party to cross-appeal an order to assert that the order gave him less than the full relief to which he was entitled, even if no rule or statute authorized a direct appeal from the order. See, State v. McInnes, 212 So.2d 761 (Fla. 1968); State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983).

The only remaining question is whether the McInnes decision has been effected by the current Florida Rules of Appellate Procedure. Florida Rule of Appellate 9.110(g)

permits cross-appeals in cases governed by that rule. Rule 9.110(a)(1) states that the rule applies to cases invoking the appellate jurisdiction of the district court of appeal to review the final orders of the trial courts not directly reviewable by the Supreme Court or a circuit court. Thus, there appears to be no impediment to a cross-appeal where an appeal has been taken by a defendant in a criminal case.

Rule 9.140(a) provides that "[a]ppeal proceedings in criminal cases shall be as in civil cases except as modified by this rule." Since nothing in Rule 9.140 prohibits a cross-appeal in a criminal case, and since the need for specific authorization for such a cross-appeal was directly rejected in State v. McInnes, 133 So.2d 581, approved in State v. McKinney, 212 So.2d 761, it seems clear that the State has a right to cross-appeal where a defendant seeks review of a final judgment of conviction. See, State v. Williams, supra, 444 So.2d at 438.

D. The Constitutional Chill and the State's Right to Direct Appellate Review

The petitioner contends that this court should preclude the State from seeking review in the present case because it would present a dangerous precedent. In particular, petitioner argues that permitting the State to cross-appeal unconstitutionally chills the election of the defendant

himself to appeal. In effect, the petitioner argues that a cross-appeal places a defendant in a Catch-22 situation. The plain and simple answer to this argument is that there can be no "chill" where the State has the right to direct review.

Although a number of cases suggest the contrary,[4] the State has a constitutional right to appeal final orders and judgments entered against it pursuant to Article V, Section 4(b)(1) of the Florida Constitution. Article V, Section 4(b)(1) provides in pertinent part:

> 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.[5]

The first case to discuss a constitutional right to appeal was Crownover v. Shannon, 170 So.2d 299 (Fla. 1964).

[4]State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983); State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983); State v. Brown, 330 So.2d 535 (1st DCA 1976). The erroneous nature of these decisions is explored in part E of this brief.

[5]In addition to this current provision of the Florida Constitution, the predecessor provision, Article V, Section 3, of the 1956 Constitution provided the State with the same right.

In Crownover, a habeas petitioner sought prohibition against a district court of appeal because the petitioner contended that the court was without jurisdiction to entertain an appeal by the State. Holding that appeals from a final judgment in habeas corpus cases should be treated as appeals in other cases of a civil nature, this court discussed whether a constitutional right to appeal existed:

> The right to appeal from the final decisions of trial courts to the Supreme Court and to the district courts of appeal has become a part of the Constitution and is no longer dependent on statutory authority or subject to being impaired or abridged by statutory law, but of course subject to rules promulgated by the Supreme Court regulating the practice and procedure. See State v. Furen, 118 So.2d 6 (Fla. 1960).
>
> Before the 1956 amendment, Article V of the Constitution did not provide the procedure for invoking the jurisdiction of the Supreme Court for purposes of review, but left such matters to the legislature and the Supreme Court; it simply provided that:
>
> > The Supreme Court shall have appellate jurisdiction in all cases at law and in equity originating in circuit courts,***.
>
> Section 59.01(3)(4), F.S.A. (Chapter 22854, Laws of Florida, 1945) provides:

"(3) Writ of Error Abolished; Appeal Substituted.--Review in this State by writ of error is abolished. All relief heretofore obtainable by writ of error may hereafter be obtained by appeals as in equity.

"(4) Appeal as a Matter of Right.--Appeals, except where otherwise expressly provided by law, shall be a matter of right."

The first paragraph of Section 5(3) of Article V of the Constitution, as amended in 1956, provides:

"Jurisdiction. Appeals from trial courts in each appellate district may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the Supreme Court or to a circuit court." (Emphasis added).

It thus appears from the foregoing constitutional provision that appeals to the courts of appeal are a matter of right and as of course. The right seems to be absolute and unqualified except where an appeal may be taken to the Supreme Court or a circuit court. There are no conditions specified in the Constitution to the right of appeal. The exception clause in Section 59.01(4), supra, is omitted from Section 5 of Article V of the Constitution, as amended.

Under present practice trial judges no longer issue writs of error or "allow" appeals and the taking of a timely appeal to the

> district courts of appeal is an unimpaired right subject only to the rules and regulations of the Supreme Court governing the manner, mean, mode and method in the taking and prosecution of the appeal...
>
> Crownover v. Shannon, supra, 170 So.2d at 301-302.

This court again reiterated that litigants have a constitutional right to appeal in State v. Smith, 260 So.2d 489 (Fla. 1972). In Smith, the trial court ordered that state witnesses be examined for visual acuity prior to their testimony at trial. By interlocutory appeal, the state sought a reversal of that order. On appeal, the First District Court of Appeal held that it lacked jurisdiction to entertain the appeal and referred to Article V, Section 5(3), Florida Constitution, which provided:

> Jurisdiction. Appeals from trial courts in each appellate district,...may be taken to the court of appeal of such district, as a matter of right, from all judgments...
>
> The Supreme Court...may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

This court, adopting the reasoning of the First District Court of Appeal, held that Section 924.07 was ineffective unless a rule from this court "breathes life" into the legislative act:

> Appellate review of any order or judgment entered by a trial court is not a right derived from the common law. The right of appellate review is derived from the sovereign; i.e., the citizens of this state. By means of Article V of the Florida Constitution, the citizens have granted to a litigant as a matter of right appellate review of a final judgment. The sovereign has decreed that "the Supreme Court...may provide for review by such courts of interlocutory orders...(emphasis theirs.). This explicit provision is clearly substantive and not procedural. the constitution does not authorize the legislature to provide for interlocutory review. Any statute purporting to grant interlocutory appeals is clearly a declaration of legislative policy and no more. Until and unless the Supreme Court of Florida adopts such statute as its own (as it did with regard to Section 94.071), the purported enactment is void.
>
> State v. Smith, supra, 260 So.2d at 490-491.

Two recent lower court decisions also recognized the State's constitutional right to appeal. In State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA), pet. for rev. denied, 419 So.2d 1201 (Fla. 1982), the Fifth District Court of Appeal held that the State had a constitutional right to appeal from an order discharging a juvenile on speedy trial grounds. Noting that district courts of appeal were given jurisdiction to hear appeals "that may be taken as a matter of right" under Article V, Section 4(b)(1), Florida

Constitution (1980), the W.A.M. court held the State had a constitutional right to appeal final judgments:

> The emphasized language would appear at first to be a mere parenthetical phrase describing the appeals which district courts have jurisdiction to hear, implying that the grant of rights to take appeals would be found in statutory law. However, the constitutional provision formally relating to the jurisdiction of district courts of appeal, Article V, Section 5(3), Florida Constitution (1956), provided in part as follows:
>
> > Appeals from trial courts in each appellate district, ...may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the Supreme Court or to a circuit court. (Emphasis supplied).
>
> This earlier provision clearly described the jurisdiction of the district courts of appeal as a corollary to the grant of the right to appeal final judgments. The Supreme Court of Florida held in Crownover v. Shannon, 170 So.2d 299 (Fla. 1964) that this provision of the Constitution describing the jurisdiction of the district court granted a right of appeal as a matter of course. In Crownover it was said that:
>
> > The right to appeal from the final decisions of trial courts to the Supreme Court and to the district courts of

> appeal has become a part of the Constitution and is no longer dependent on statutory authority subject to be impaired or abridged by statutory law..."
>
> Notwithstanding the substantial difference in language between the former constitutional provision considered in Crownover and the present provision relating to the jurisdiction of the district courts of appeal, we do not believe such changes were intended to eliminate the right of appeal from final judgments.
>
> State v. W.A.M., supra, 412 So.2d at 50.

In State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983), the Third District Court of Appeal panel opinion[6] followed the rationale of Crownover and W.A.M. The State appealed from the trial court's dismissal from a petition for delinquency because of a violation of the juvenile's constitutional right to a speedy trial. Noting that W.A.M. and Crownover stood for the proposition that Article V of the Constitution in 1957 created a constitutional right to appeal, the court agreed that the State's constitutional right to appeal survived the changes to Article V of the Florida Constitution in 1980:

[6]Both W.A.M. and G.P. are on review to this court. The G.P. panel decision was subsequently rejected by the Third District Court of Appeal in State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983)(en banc). The faulty rationale underlying the en banc opinion in C.C. is discussed in part E.

> [Art. V, Section 5(3), Fla.Const. (1957)] "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed or protected without the aid of legislative enactment," Gray v. Bryant, 125 So.2d 846, 851 (Fla. 1960), and therefore, it is self-executing. See, State v. Harris, 136 So.2d 633 (Fla. 1962)(holding that the constitutional provision authorizing the Supreme Court to review conflicting decisions of the district courts is self-executing). By definition, then, no statute was necessary to breathe life into the Constitution authorizing appeals. As necessary corollary, the jurisdiction conferred upon the court by the Constitution could not be diminished nor enlarged by an act of the legislature. See Warren v. State, 174 So.2d 429 (Fla. 1st DCA 1965). Accordingly, we would agree with the dictum in Crownover...
>
> Since the jurisdictional provision makes no distinction between the State's right to appeal and any other party litigant's, the State should enjoy the same rights as all others, with the obvious exception of double jeopardy bar. The court concluded, in W.A.M., supra, that although there have been changes in the constitution since the 1957 Amendment relied on in Crownover, supra, the State's constitutional right to appeal remains intact.
>
> State v. G.P., supra, 429 So.2d at 787.[7]

[7]Even though the G.P. panel found a State constitutional right to appeal, it nonetheless granted the motion to dismiss because it felt the decision of this court in Whidden v. State, 32 So.2d 577 (Fla. 1947), was controlling. See, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). (con't)

In reviewing these decisions, it becomes clear that the State could have filed a direct appeal to the district court of appeal in this case.[8] Because the State could have obtained directed review, there can be no "chill" of the petitioner's right to appeal. The Catch-22 fear of the petitioner does not exist.

Even if no constitutional right to appeal existed, the State could have obtained appellate review by common law certiorari. Where an appeal or writ of error is not available, an appellate court may determine whether the lower tribunal exceeded its jurisdiction or acted in a manner contrary to the essential requirements of law. Harrison v. Fink, 75 Fla. 22, 77 So. 663 (1918); Kilgore v. Berg, 149 Fla. 570, 6 So.2d 541 (1942); State v. Smith, 260 So.2d 489 (Fla. 1972); State v. I.V., 366 So.2d 186 (Fla. 1st DCA 1979); State v. Wilcox, 351 So.2d 89 (Fla. 2d DCA 1977); State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982); Florida Rule of Appellate Procedure 9.030(b)(3); Article V, Section 4(b)(3), Fla.Const. (1980).

This was error. A decision that a constitutional right to appeal existed would not have conflicted with the Supreme Court's opinion in Whidden. Whidden was decided under the pre-1957 constitution which left appellate matters to the legislature. Because the constitution had changed, no conflict would have occurred.

[8]This right to appeal is limited only by double jeopardy considerations in the criminal arena. For the applicability of the double jeopardy clause in the present, see part F of this brief.

The State could have obtained a review by recharacterization of the order as one dismissing an indictment or information or any count thereof. Florida Rule of Appellate Procedure 9.140(c)(1)(A). See, State v. Harris, 439 So.2d 265 (Fla. 2d DCA 1983).

E. Statutory Control of the State Right to Appeal

A recurrent theme in the petitioner's brief is that the State's right to appeal in criminal cases is purely statutory. As a result, the petitioner argues that the failure of the legislature to explicitly permit an appeal from a post-trial judgment of acquittal renders the State helpless and without an avenue of review. As has previously been noted, the legislature cannot restrict or expand the constitutional right to appeal. Crownover v. Shannon, 170 So.2d 299 (Fla. 1964); State v. Smith, 260 So.2d 489 (Fla. 1972). State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA), pet. for rev. den., 419 So.2d 1201 (Fla. 1982). Nonetheless, this court should clarify the confusion in this area. A close examination of the support for recent decisions holding that the State right to appeal is statutory, see, State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976); State v. C.C., (Fla. 3d DCA 1983), demonstrates that the decisions were wrongly decided.

In State v. Brown, supra, the State sought to appeal a post-verdict judgment of acquittal.[9] Granting the appellee's motion to quash the appeal, the First District Court of Appeal held that the State's right to appeal was purely statutory:

> Appellate review of any order or judgment entered by a trial court is not a right derived from the common law; it is derived from the sovereign. State v. Smith, 260 So.2d 489 (Fla. 1972). The State's right to seek appellate review in a criminal case is purely statutory and is found in Florida Statute 924.07. Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947).
>
> State v. Brown, supra, 330 So.2d at 536. (Footnote omitted).

While the Brown court was correct to note that the right to appeal is derived from the sovereign, it missed the essential thrust of State v. Smith, 260 So.2d 489 (Fla. 1972), as well as Crownover v. Shannon, 170 So.2d 299 (Fla. 1964). Both Smith and Crownover plainly stand for the proposition that a litigant's right to appeal under the post-1957 Florida Constitution is constitutional, not statutory. Although Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947), announced that the State's right to appeal was

[9]It should be noted that the present case involves not an appeal, but a cross-appeal. Nonetheless, an examination of the underlying basis of Brown nonetheless indicates that it should be disapproved.

statutory, it did so under the pre-1957 Florida Constitution. As such, reliance on Whidden was misplaced.

The State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983), decision suffers from the same problem. Pointing to both Whidden and Brown, the Third District also erroneously concluded that the State's right to appeal was purely statutory. The concurring opinion in C.C. suggests that the W.A.M. case wrongfully relied on the Crownover decision. To support this suggestion, the concurrence indicates that Article V, Section 4(b) of the Constitution grants only civil litigants appellate review. State v. C.C., supra, 449 So.2d at 280-281, n.1.

Such a contention is absolutely devoid of any support. There is no indication that Article V, Section 4(b) is limited to civil matters. Indeed, the suggestion that the constitutional right to appeal is limited to civil litigants is refuted by this court's opinion in State v. Smith, supra. Furthermore, such a holding is contrary to a number of decisions guaranteeing the right to appeal in criminal matters. Marshall v. State, 344 So.2d 646, 648 (Fla. 2d DCA 1977); Carr v. State, 180 So.2d 381, 382 (Fla. 2d DCA 1965); State v. Mims, 267 So.2d 52 (Fla. 1st DCA 1972). See also State v. Meyer, 430 So.2d 440 (Fla. 1983); Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969).

F. Review of a Post-Verdict Acquittal is Not Barred by Double Jeopardy

The concern raised in the C.C. decision and by the petitioner in the court below was that permitting the State to appeal and obtain relief from erroneous acquittals would violate double jeopardy. Double jeopardy, however, forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Tibbs v. Florida, 102 S.Ct. 2211, 2218 (1982); United States v. Scott, 437 U.S. 82 (1978); Burks v. United States, 437 U.S. 1 (1978); Green v. Massey, 437 U.S. 19 (1978). Such a concern is not present in the instant case.

It is clear that double jeopardy is a consideration only when a retrial of the defendant would be necessitated by a reversal of the trial court's ruling. Compare Mixon v. State, 59 So.2d 38 with Watson v. State, 410 So.2d 207 (Fla. 1st DCA 1982). Where the State's appeal is from a post-verdict judgment of acquittal on the charge of first degree murder, a reversal of that ruling will result only in the reinstatement of the jury's verdict and the directed entry of a judgment thereon, not in a retrial of the defendant. The United States Supreme Court elaborated on this concept in United States v. Wilson, 420 U.S. 332 (1975):

> A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it permit him to re-examine the weaknesses of his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interests in the finality of a verdict of acquittal. These interests, however, do not apply in the case of a postverdict ruling of law by a judge. Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harrassment traditionally associated with multiple prosecutions.
>
> United States v. Wilson, supra, 420 U.S. at 353.

The Supreme Court came to the identical conclusion three years later in United States v. Scott, 437 U.S. 82 (1978):

> In Jenkins we had assumed that a judgment of acquittal could be appealed where no retrial would be needed on remand:

> When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment of the verdict. 420 U.S., at 365, 95 S.Ct., at 1011.
>
> Despite the court's heavy emphasis on the finality of an acquittal in Martin Linen and Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43, neither decision explicitly repudiates this assumption.
>
> United States v. Scott, supra, 437 U.S. at 91 n.7.

A review of these decisions and the Double Jeopardy Clause itself demonstrates that a defendant would not risk being "tried again" by granting relief in this case.[10] Because the present appeal involves the review of a

[10]The concurrence in C.C. worried that the State could appeal from a final judgment of acquittal in a criminal case. That concern, however, should present no bar to the jurisdiction of a court to hear the State's appeal. Article V, Section 4(b)(1), construed with Article I, Section 9 would provide a clear answer. In a situation where double jeopardy would provide a bar, in appellate court may decide the case is moot or entertain the appeal because of the need to correct a potentially recurring problem.

post-verdict judgment of acquittal, no double jeopardy considerations exist.

CONCLUSION

Based on the foregoing rationale and authority, the respondent submits the Third District Court of Appeal correctly permitted the State to obtain appellate review of the trial court's post-trial judgment of acquittal. The State's right to appeal, whether by cross-appeal or through plenary review, is constitutionally protected by Article V, Section 4(b)(1), Fla.Const. (1980). Neither the legislature or this court may restrict that right.

Because of this constitutional right to appeal, there is no "chill" on a defendant's determination of whether to take an appeal.

As such, the opinion of the Third District Court of Appeal should, in all respects, be affirmed.

Respectfully submitted,

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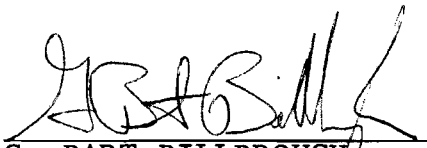
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to R. JAMES PELSTRING, 305 Coconut Grove Bank Building, 2701 South Bayshore Drive, Miami, Florida 33133, on this 12th day of March, 1985.



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