IN THE SUPREME COURT OF FLORIDA

CASE NO: 66,811

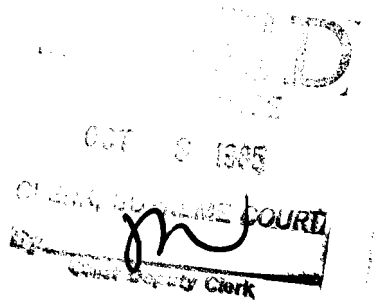
STATE OF FLORIDA,

Petitioner,

vs.

RENE RAMOS,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

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ANSWER BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, RENE RAMOS, is the Appellant/Cross-Appellee in the Third District Court of Appeal and the Defendant in the trial court. The Petitioner, THE STATE OF FLORIDA, is the Appellee/ Cross-Appellant in the District Court of Appeal and the prosecutor in the trial court. The parties will be referred to by name or as Petitioner and Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts filed by Petitioner as substantially correct, but may supplement those facts where necessary.

SUMMARY OF ARGUMENT

The Third District Court of Appeal was acting within its jurisdiction when it rendered the opinion under review because the matters decided in the opinion were not the same as those decided in Case Number 65,964 currently pending before this court. Additionally, no stay had been entered in the lower court prohibiting the lower court from proceeding with the cause and this court had not exercised its discretion to answer all ancillary questions in the case.

The lower court correctly determined that in a criminal appeal Florida Rule of Appellate Procedure 9.140 is controlling over Florida Rule of Appellate Procedure 9.350(b) in matters unique to a criminal appeal. A judgment of acquittal is a matter unique to criminal law and the state is not permitted to take an appeal of a judgment of acquittal without a direct appeal by the Defendant. When a direct appeal is dismissed the cross-appeal of the state becomes a direct appeal of the judgment of acquittal with the result that if permitted to stand alone, Rule 9.350(b) would be controlling Rule 9.140. This result is not the intention of the rules, is expressly forbidden by the rules and by State vs. Creighton, 469 So.2d 735 (Fla. 1985).

ARGUMENT

A) THE LOWER COURT HAD JURISDICTION TO PROCEED WITH THE CASE UNDER REVIEW.

When an appeal is taken, and a matter transferred to a higher court, only jurisdiction to further act on the reviewed subject matter is withdrawn from the lower tribunal, and it may conduct further proceedings in the cause on other issues. Mandrachia vs. Ravenswood Marine, Inc., 118 So.2d 817 (Fla. 2nd DCA 1960); Seiferth vs. Seiferth, 121 So.2d 689 (Fla. 3rd DCA 1960); Bailey vs. Bailey, 392 So.2d 49 (Fla. 3rd DCA 1981).

The matter pending before the Supreme Court in Case Number 65,964, is a Petition to review the lower tribunals opinion which held that the State was permitted to cross-appeal a judgment of acquittal when the Defendant appealed his conviction. The subject matter of Case Number 65,964 is the scope of appeals permitted under Florida Rule of Appellate Procedure 9.140(c)(H) and Florida Statute 924.07(4): in other words, what should be included under "questions of law".

In the second opinion of the lower tribunal Ramos vs. State, 469 So.2d 145 (3rd DCA 1985), a distinct issue has been decided, i.e. whether a cross-appeal by the state, on matters specifically and only permitted as a cross-appeal, are wholly derivative and dependent on the existance of an appeal by a Defendant.

In Ramos vs. State, 469 So.2d 145 (3rd DCA 1985), the lower tribunal has not altered or receded from its previous opinion in Ramos vs. State, 457 So.2d 492 (3rd DCA 1984), that the Court may entertain a cross-appeal under Florida Statute 924.07(4) of a

judgment of acquittal by classifying it as a question of law. Therefore, the lower tribunal has not proceeded in the area of the subject matter under review by this Court in Case Number 65,964. This becomes readily apparant upon review of the State's brief on the merits of Case Number 66,811, where the state requests this Court to exercise its discretion to decide the merits. In the state's argument, the focus is on the issue of the vesting of a cross-appeal.

The cases cited by the State on the issue of the lower tribunal's jurisdiction to continue with the case make clear that the court did have jurisdiction to render the second opinion. Mark vs. Hahn, 177 So.2d 5 (Fla. 1965) involved the exercise of the Supreme Court's discretion to take the case for all purposes. Mark makes it clear that the question was not jurisdictional, as the state asserts. The same process was involved in Trushin vs. State, 425 So.2d 1126 (Fla. 1983), where the court recognized that although it had the authority to entertain issues ancillary to the certified issues, it would decline to do so. Ironically, it has been Ramos who has attempted to stay proceedings in the lower court pending the disposition of Case Number 65,964 in this court. This request has been previously denied. Therefore, the case continued in the lower court.

A court may, at any time, whether on motion of a party, or on its own motion, inquire into its own jurisdiction over the case. Lovett vs. The City of Jacksonville Beach, 187 So.2d 96 (Fla. 1st DCA 1966). Once a determination has been made that jurisdiction

is lacking, it is the court's duty and responsibility to cease exercising that jurisdiction. Ford Motor Company vs. Averill, 355 So.2d 220 (Fla. 1st DCA 1978).

In the present case, the lower court has determined it lacks jurisdiction and has stayed its mandate (RA-14) pending resolution in this court of the matters which are before it. Therefore, no final disposition of the case has been made by the Third District, See, State ex rel. Davis vs. City of Clearwater, 146 So. 836 (Fla. 1933), which would interfere with this court's determination of the issues presented in Case Number 69,964. Trushin vs. State, 425 So.2d 1126 (Fla. 1983).

B) A CROSS-APPEAL BY THE STATE IS GOVERNED BY FLORIDA RULE OF APPELLATE PROCEDURE 9.140 AND IS DERIVATIVE AND DEPENDENT UPON A DIRECT APPEAL BY RAMOS UNLESS SPECIFICALLY AUTHORIZED AS A DIRECT APPEAL BY SOME OTHER PART OF THE RULE.

On the merits of the lower court's opinion the state has argued that Florida Rule of Appellate Procedure 9.350(b) is authority to maintain its cross-appeal independent of a direct appeal by the Defendant. This reliance is misplaced because of the distinction in the rules between civil and criminal appeals. As stated in the opinion under review:

> "Although the state correctly observes that the appellate rules generally apply to criminal as well as civil appeals, see State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), it overlooks that the purpose of the rule's proviso giving a cross-appeal life independent of the main

> appeal is to insure a cross-appellant the right of review of adverse trial court rulings to which such cross-appellant would have been entitled had he filed the main appeal. Thus, when a party has taken a cross-appeal from an unfavorable part of a substantially favorable judgment, see Webb General Contracting, Inc. v. PDM Hydrostorage, Inc., 397 So.2d 1058, 1059-60 (Fla. 3d DCA 1981) ("The function of a cross-appeal is to call into question error in the judgment appealed, which, although substantially favorable to the appellee, does not completely accord the relief to which the appellee believes itself entitled."), Rule 9.350(b) operates to allow the cross-appeal to continue despite the termination of the main appeal. This is so, however, only when the cross-appellant could have initially appealed the adverse ruling encompassed in an order or judgment. The rule does not apply where the cross-appellant could not have initially appealed, since in that instance, the cross-appeal depends entirely on the existence of an appeal. Thus, for example, a cross-appellant having no right to appeal an order denying his motion for directed verdict where the ultimate jury verdict is in his favor, has no right to a continuation of his cross-appeal of that ruling after the dismissal of the main appeal. Similarly, in the present case, where the State is not authorized to appeal the ruling that the evidence was insufficient to sustain the jury's verdict of first-degree murder, State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976), and is only authorized to cross-appeal such ruling, Ramos v. State, 457 So.2d 492, the dismissal of the main appeal prior to decision puts an end to the State's appellate rights." (Footnotes omitted)

Ramos vs. State, 469 So.2d 145, 146 (3rd DCA 1985).

While it is true that Florida Rule of Appellate Procedure 9.140(a) generally applies civil appellate rules to criminal proceedings, it is also true that the rules do not apply to

"...those matters unique to criminal law which are identified and controlled by this rule."

Committee notes to Florida Rule of Appellate Procedure 9.140.

Florida Rule of Appellate Procedure 9.140(a) states "appeal proceedings in criminal cases shall be as in civil cases except as modified by this rule." Thereafter, Rule 9.140(c) lists those appeals which may be brought by the State. It is now clear that Florida Statute 924.07 and Florida Rule of Appellate Procedure 9.140(c) do not permit an appeal by the State of a final judgment of acquittal. State vs. Creighton, 469 So.2d 735 (Fla. 1985). It is equally apparent that such an appeal should not be permitted under the guise of a cross-appeal (an issue currently before this Court in Case Number 65,964) and certainly could not stand on its own as a direct appeal once the original appeal is dismissed. If the State's appeal is permitted to stand it will be a direct appeal of a judgment of acquittal. Rule 9.350(b) will be permitted to take precedence over Rule 9.140, a result expressly opposed in Rule 9.140(a) and in State v. Creighton, 469 So.2d 735 (Fla. 1985).

Counsel is aware of Zimmerman vs. State, 467 So.2d 1119 (1st DCA 1985). However, in that case the State was permitted to appeal an illegal sentence directly under rule 9.140(c)(1)(I) and, presumably, would have done so in the absence of the Defendant's appeal. Zimmerman is consistant with the decision under review on this appeal.

CONCLUSION

Respondent, RENE RAMOS, respectfully requests this court affirm the opinion of the Third District Court in Ramos vs. State, 469 So.2d 145 (3rd DCA 1985).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30 day of SEPTEMBER, 1985 to: Office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, FL 33128.

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