IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,811

THE STATE OF FLORIDA,

Petitioner,

vs.

RENE RAMOS,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

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

"A" designates the attached appendix and shall be accompanied by an appropriate page number.

STATEMENT OF THE CASE AND FACTS

On October 28, 1982, a Dade County Grand Jury charged the respondent, Rene Ramos, with first degree murder and aggravated assault. The trial on both charges was commenced on February 8, 1983.

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

After the jury returned a verdict of guilty on both charges, the trial court granted a post-verdict motion for judgment of acquittal and reduced the respondent's conviction to second degree murder. The respondent filed a notice of appeal and the State filed a notice of cross-appeal.

On April 16, 1984, the respondent filed his initial brief and moved 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). The Third District held that the trial court's post-verdict acquittal was a question of law and that consideration of the issue was not barred by double jeopardy. Ramos v. State, 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 respondent filed a notice to invoke discretionary jurisdiction. Because the Third District Court of Appeal denied the respondent'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 respondent contemplate filing a conditional notice of voluntary dismissal, thereby frustrating the State in its efforts to obtain appellate review. The respondent filed such a pleading the next day.

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. (A. 6-13).

On January 28, 1985, this court accepted jurisdiction of the case. (A. 14).

Even though jurisdiction lay in this court, the Third District Court of Appeal dismissed the case. Ramos v. State, ___ So.2d____, Case No. 83-949 (Fla. 3d DCA March 12, 1985)[10 F.L.W. 688]. The Third District Court of Appeal held that the State, as cross-appellant, had no right to independently appeal the ruling that the evidence was insufficient to sustain the jury's verdict of first degree murder and was only authorized to cross-appeal the ruling. Ramos v. State, supra, 10 FLW at 689. (A. 1-4). This appeal followed.

ISSUE ON APPEAL

WHETHER THE THIRD DISTRICT COURT OF APPEAL OPINION IN THE INSTANT CASE CONFLICTED WITH WELL SETTLED FLORIDA DECISIONAL LAW PERMITTING THE STATE THE CONSTITUTIONAL RIGHT TO APPEAL PURSUANT TO ARTICLE V, SECTION 4 (B)(1), FLORIDA CONSTITUTION (1980), PROHIBITING ADVISORY OPINIONS, AND DECIDING CONTROVERSIES WHERE A REVIEWING COURT HAS ACCEPTED JURISDICTION OF THE MATTER?

SUMMARY OF ARGUMENT

The March 12, 1985, opinion of the Third District Court of Appeal conflicts with previous opinions from this court as well as its sister courts on three separate and important areas of Florida law. First, the dismissal of both appeals under the circumstances of this case constituted the rendition of an advisory opinion. Secondly, the court rendered a decision when it no longer had jurisdiction over the case. Finally, the decision in the instant case dismissing the State's cross-appeal because the State had no right to directly appeal the issue conflicted with two decisions of this court and numerous decisions of its sister courts. A review of each area demonstrates that this court should exercise discretionary review in this matter.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL OPINION IN THE INSTANT CASE CONFLICTS WITH WELL SETTLED FLORIDA DECISIONAL LAW PERMITTING THE STATE THE CONSTITUTIONAL RIGHT TO APPEAL PURSUANT TO ARTICLE V, SECTION 4(B)(1), FLORIDA CONSTITUTION (1980), PROHIBITING ADVISORY OPINIONS, AND DECIDING CONTROVERSIES WHERE A REVIEWING COURT HAS ACCEPTED JURISDICTION OF THE MATTER.

A. Advisory Opinion

The notice of conditional dismissal filed in this case was truly unique. The notice stated that the petitioner wanted to drop his appeal in the present case if and only if the Third District Court of Appeal would, in advance, conclude that dismissal of the appeal would divest the Third District Court of Appeal of jurisdiction on the State's cross-appeal. The petitioner further moved that if the court disagreed, it should disregard his notice of dismissal. (A. 5).

The action of granting the dismissal of both cases expressly conflicts with decisional law in this state prohibiting courts of appeal from giving legal advise and rendering advisory opinions. Advisory Opinion to the Governor, 196 So.2d 737 (Fla. 1967); Dobson v. Crews, 164 So.2d 252 (Fla. 1st DCA 1964), aff'd, 177 So.2d 202 (Fla. 1965); Collins v. Horton, 111 So.2d 746 (Fla. 1st DCA 1959); Schwartz v. Nourse, 190 So.2d 389 (Fla. 4th DCA 1980).

The petitioner requested and was granted an advisory opinion because the petitioner did not know what course of action would serve his best interest. Instead of making an election, the petitioner simply asked the Third District Court of Appeal to rule on the jurisdiction of the State's cross-appeal if the petitioner decided to dismiss his original appeal and then asked this court to treat his notice of conditional dismissal in whatever way will be most beneficial to the petitioner. The petitioner asked the Third District Court of Appeal to become the State's adversary and the Third District Court of Appeal did so.

The courts of this state have always rejected attempts to manufacture jurisdiction. See, State v. Vogel, 415 So.2d 821 (Fla. 2d DCA 1982). The opinion by the Third District Court of Appeal was advisory, prohibited by the concept of judicial restraint, and conflicted with the above-cited cases. Because of the gravity of this situation, this court should exercise its discretion to resolve this matter.

B. Lack of Jurisdiction

When this court accepted jurisdiction of the present case on January 28, 1985, the Third District Court of Appeal automatically became divested of its jurisdiction. The issuance of an opinion on March 12, 1985, while the case was still pending in this court, was done without jurisdiction and resultingly conflicts with two decisions from this court and numerous decisions from the other district courts of appeal in the state.

Over 50 years ago, this court recognized that there can be no twilight zone of jurisdiction nor vacuum in its application. Jurisdiction is either effective full force or not at all. State ex rel. Davis v. City of Clearwater, 146 So. 836 (Fla. 1933). This concept has developed into the well-settled rule that when an appeal is duly taken, the jurisdiction of the cause is transferred to the reviewing court, thereby depriving the lower court of power to dispose of the cause by dismissal or otherwise. Stated another way, perfection of an appeal terminates the jurisdiction of a lower court to proceed on the subject matter of the appeal until the appeal is determined or unless authorized by the appellate court. De La Portilla v. De La Portilla, 304 So.2d 116 (Fla. 1974); State v. Florida Turnpike Authority, 134 So.2d 12 (Fla. 1961). General Portland Development Co., v. Stevens, 356 So.2d 840 (Fla. 4th DCA 1978). The opinion of the Third District Court of Appeal conflicts with each of these decisions.

Even assuming that the "subject matter" of the direct appeal was different from the cross-appeal, which it is not, the matter under consideration in this court was the ability of the State to take a cross-appeal. This court's acceptance of jurisdiction, by its very nature, terminated jurisdiction in the Third District Court of Appeal, at the very least as it relates to the cross-appeal.

This court should accept jurisdiction on this issue for important policy reasons. Although there are numerous cases which stand for the proposition that jurisdiction in an appellate court divests jurisdiction in the lower court, this area has not been discussed where the appeal is to this court and the district court of appeal is the lower tribunal. In order to stabilize this important area of appellate law, a ruling by this court is necessary.

C. Dismissal of the State's Cross-Appeal

Although recognizing that Florida Rule of Appellate Procedure 9.350 (b) states that dismissal of an appeal prior to decision on the merits does not affect a cross-appeal, the Third District Court of Appeal held such language inapplicable to the present case because the State had no right to obtain direct review of the lower court's ruling. The conclusion that the State's right to appeal was left to the discretion of the defendant ignores and conflicts with two previous decisions of this court which recognize the State's constitutional right to appeal. Crownover v. Shannon, 170 So.2d 299 (Fla. 1964); State v. Smith, 260 So.2d 489 (Fla. 1972). Noting the changes in Article V of the Florida Constitution, this court has plainly stated that the citizens have granted to litigants as a matter of right appellate review from final judgments. Any statute purporting to grant or limit such an appeal is merely a

declaration of legislative policy. State v. Smith, supra, 260 So.2d at 490-491. Other courts of this State have similarly recognized the constitutional right to appeal. State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA), pet. for rev. denied, 419 So.2d 1201 (Fla. 1982); State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983).[1]

It is plain that the Third District is determined to limit the State's constitutional right to appeal. In fact, this case has represented Chief Judge Schwartz' worst fear realized: State appeal of a final judgment in a criminal case. See, State v. C.C., supra. This court should accept jurisdiction, as it has done in all previous cases, to resolve this burning issue of appellate law and complete proper analysis of the constitutional right to appeal.

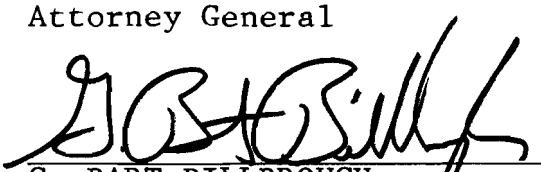
[1]The G.P. decision is on review in this court along with other decisions on the constitutional right to appeal. Although the G.P. panel adopted the reasoning of W.A.M. and Crownover, the Third District Court of Appeal rejected its reasoning in State v. C.C., 449 So.2d 280 (Fla. 3d DCA 1983) (en banc). That case is also on review before this court.

CONCLUSION

Based upon the foregoing rationale and authority, the Petitioner requests this Court to grant discretionary review in this cause.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furnished by mail to R. JAMES PELSTRING, Esquire, 305 Coconut Grove Bank Building, 2701 South Bayshore Drive, Miami, Florida 33133, on this 4th day of April, 1985.

G. BART BILLBROUGH
Assistant Attorney General

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