OA 4-9-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. ~~65,964~~ 66,811

THE STATE OF FLORIDA,

Petitioner,

vs.

RENE RAMOS,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON JURISDICTION

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BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida

R. JAMES PELSTRING
Special Assistant Public Defender
305 Coconut Grove Bank Bldg.
2701 South Bayshore Drive
Miami, FL 33133
(305) 858-0444

ATTORNEYS FOR RESPONDENT

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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 Third District Court of Appeal and the prosecutor in the Trial Court. The parties will be referred to by name or as they stood before the Trial Court, or as Petitioner and Respondent.

The attached appendix of Respondent will be designated by the symbol "RA".

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of facts of Petitioner as substantially correct except for the following additional facts, and facts to be argued in the within brief.

The decision in Ramos vs. State, _____So.2d _____ 1985, Case No. 83-949 (Fla. 3rd DCA March 12, 1985) (10 F.L.W. 688) was rendered March 12, 1985. The State simultaneously filed in this Court, Emergency Motion to Stay Proceedings in the Third District, and for Writ of Prohibition (RA-1-3) and in the Third District, a Motion to Withdraw the Opinion (RA-4-6). Ramos responded to both motions (RA-7-12).

On March 19, 1985, this Court denied the State's Emergency Motion (RA-13). On the same date, the Third District denied the State's Motion to Withdraw the Opinion and then Stayed the issuance of mandate in the case pending the disposition of the case in the Supreme Court (RA-14).

On March 25, 1985, the State Petitioned for Discretionary Review in this Court (RA-15) and simultaneously moved for a stay of Mandate in the Third District (RA-16-17). The Third District denied the motion as moot because it had already stayed the mandate by previous order. (RA-18)

POINT ON APPEAL

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW

SUMMARY

Petitioner seeks discretionary review of the Third District opinion in Ramos vs. State, Case No. 83,949, opinion filed March 12, 1985, on the grounds setforth in Fla.R.App.P. 9.030(a)(2)(A)(iv), asserting that the opinion expressly and directly conflicts with decision of other District Courts of Appeal or the Supreme Court on the same question of law.

The State asserts conflict on these separate areas: Adversary Opinion, Jurisdiction, and F.S. 924.07. Respondent will address each in the order briefed by the State. A reading of the cases cited by the State clearly reveals that not one of them provide the express and direct conflict asserted in the Petition for Discretionary Review.

A. THE OPINION BELOW IS NOT AN ADVISORY OPINION AND DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY OPINIONS OF THE SUPREME COURT OR OTHER DISTRICT COURTS OF APPEAL.

The Petitioner characterizes the opinion of the Third District as an advisory opinion in an attempt to find conflict with cited decisions of this and other courts. However, it is clear that the opinion under consideration is not advisory. An advisory opinion is an opinion to a legislative body or government official, in a non-adversary setting on a question of law presented. See, Blacks Law Dictionary, page 75, 4th Edition, 1951, West Publishing.

In the present case, the court ruled upon Ramos second motion to dismiss the state's cross-appeal. the motion pending before the Third District Court was and is an actual controversy between two party litigants. It has been and is an adversary proceeding. Both parties to the litigation presented argument to the court both orally and in writing on the issue determined by the decision. The decision effects those parties before the court and is not abstract. The decision does not go beyond the relief requested by ruling on collateral motions.

All of the cases cited by the petitioner are distinguishable on their facts and subject matter.

In Advisory Opinion to the Governor NO 36214, 196 So.2d 737 (Fla. 1967) the Supreme Court refused to issue an advisory opinion to the governor because the answer would impact a party who was not before the court and thus deny the party the right to be heard. In Schwartz vs. Nourse, 390 So.2d 389 (Fla. 4th DCA 1980), the trial court was reversed for rendering on advisory opinion to various local law enforcement officials. The reason for the reversal was

the lack of an existant legal proceeding. There were no adversaries before the court who would be affected by the decision.

In Collins vs. Horton, 111 So.2d 746 (Fla. 1st DCA 1959), the trial court was called upon to determine whether a rule promulgated pursuant to a statute was valid. The court found the rule invalid as exceeding the authority of the board as authorized by statute. The error of the trial court was in thereafter making a determination on the constitutionality of some hypothetical state legislation, in essence, a ruling which not only involved the legislative branch of government, but also did not resolve an existant controversy between the parties.

The same reasoning applies to Dobson vs. Crews, 164 So.2d 252 (Fla. 1st DCA 1964), wherein the court ruled upon the controversy between the parties (appropriately) and then refused to issue a broader ruling on matters which were not before it in the controversy

In the present case the issues decided a) affects the party litigants; b) rules on an issue presented to the court; c) arises in the context of an adversary proceeding; d) resulted from written and oral argument on the subject; e) does not seek to merely give advice, and, f) was within the jurisdiction of the court to hear. Respondent respectfully submits that no conflict has been shown with any of the cases cited by Petitioner.

B. THE THIRD DISTRICT PROPERLY CONTINUED WITH THE CASE PENDING REVIEW BY THE SUPREME COURT AND HAD JURISDICTION TO RENDER THE OPINION QUESTIONED.

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 this 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 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. In the opinion which offends the State, the lower tribunal has not altered or receded from its previous position that the Court may entertain the cross-appeal. The lower court has simply proceeded in the cause on new issues (as described in the opinion) and issued a totally independent ruling.

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).

Furthermore, there is no conflict with the decision cited by the State in its Petitioners brief. De La Portilla vs. De La Portilla, 304

So.2d 116 (Fla. 1974), only prohibits the lower tribunal from finally disposing of the case pending review. In the present case, the lower court 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). State vs. Florida Turnpike Authority, 134 So.2d 12 (Fla. 1961), has absolutely nothing to do with the issues before the court today.

General Portland Development Company vs. Stevens, 356 So.2d 840 (Fla. 4th DCA 1978), only reversed a final judgment based on facts which had been determined in a trial which was reversed by the appellate court. Presumably, had the subject final judgment not included those facts, the lower court in that case would not have violated the general rule prohibiting it from proceeding in the subject matter of the appeal.

As stated previously, the Third District has not altered or receded from its opinion which is currently under review, but merely proceeded in the case on other developments. Since the Third District has also stayed its mandate, no conflict with any of the cited cases is shown by the State.

C. THE OPINION DOES NOT CONFLICT WITH CROWNOVER vs. SHANNON, 170 So.2d 299 (Fla. 1964) or STATE vs. SMITH 260 So.2d 489 (Fla. 1972).

The lower court has ruled that the State's cross-appeal, pursuant to F.S. 924.07, cannot stand when the appellant dismisses his appeal because F.S. 924.07 does not permit the state to appeal a judgment of acquittal directly.

The alleged conflict with Crownover vs. Shannon, 170 So.2d 299 (Fla. 1964), is the state's assertion of a constitutional right to appeal in criminal cases. However, Crownover vs. Shannon, supra, did not deal with the subject of criminal appeals and did not discuss the state's rights either under the constitution or F.S. 924.07.

Crownover involved a defendant seeking prohibition to prevent a district court from entertaining an appeal by a prison superintendent 32 days after the grant of habeas corpus relief, on the basis that the then controlling statute (SS 924.10) limited the state to appealing within 30 days after "the order or sentence . . . is entered." This Court carefully reviewed its prior decisions which had held that appeals from orders granting habeas corpus relief were governed by the cited statute controlling State appeals, and only after noting that in none of those cases was the State a party, then concluded that habeas corpus was a collateral attack, was civil in nature, and that the statute did not control. In thereby receding from its prior cases, and although stating in broad language that the right to appeal from final judgments of trial courts was no longer dependent upon statutory authority, this Court did not in the slightest respect question the validity of the statute governing the State's right to appeal.

The States reliance upon State vs. Smith, 260 So.2d 489 (Fla. 1972) is similarly misplaced. The Smith case dealt with a statute which authorized the state to take interlocutory orders from pre-trial rulings in criminal cases. The Smith court noted that the subject of review of interlocutory orders was reserved to the Supreme Court by Article V of the Florida Constitution, and that the legislature does not have that perogative with respect to interlocutory review. No portion of the Smith case held or even addressed whether or not the state could appeal directly from a final judgment of acquittal. On the other hand, this Court has stated, in State vs. Harris, 136 So.2d 633 (Fla. 1962)

> ". . . we have no doubt that [the legislature] can restrict the state in seeking review by certiorari of adverse decisions in criminal cases just as it has limited its right to appeal through Section 924.07."
>
> (emphasis supplied)

CONCLUSION

Respondent respectfully submits that the Petitioner has failed to demonstrate express and direct conflict between the lower court's opinion and any of its cited cases. In reality, the precise question resolved by the Third District is one of first impression in Florida. For those reasons discretionary review should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 19th day of April, 1985 to: Office of the Attorney General, G. BART BILLBROUGH, Esq., 401 N.W. 2nd Avenue, Suite 820, Miami, FL 33128; Sid J. White, Clerk of the Supreme Court of Florida.

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida

R. JAMES PELSTRING
Special Assistant Public Defender
305 Coconut Grove Bank Bldg.
2701 South Bayshore Drive
Miami, FL 33133
(305) 858-0444

BY: 
R. JAMES PELSTRING