

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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JOSEPH VETRICK,
Petitioner/Former Husband,
v.
SUSAN LEE HOLLANDER,
Respondent/Former Wife.

Case No.

FILED
SID J. WHITE
JAN 9 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITION FOR WRIT OF CERTIORARI

Petitioner/Former Husband JOSEPH VETRICK hereby petitions this Court pursuant to Rule 9.030(a)(3), Fla. R. App. P., for the issuance of a common law writ of certiorari.

BASIS FOR INVOKING THIS COURT'S JURISDICTION

Petitioner herewith seeks to have this Court exercise its all writs jurisdiction to issue a common law writ of certiorari to provide relief from an order entered by the Fourth District Court of Appeal which is a substantial departure from the essential requirements of law insofar as it dismisses a meritorious appeal on the basis of non-prejudicial, non-jurisdictional defects in the notice of appeal.

FACTUAL BACKGROUND

On November 18, 1983, Appellant timely filed his Notice of Appeal from a Final Judgment entered in Case Number 77-19407 then pending in the Circuit Court of the Seventeenth Judicial Circuit In and For Broward County, Florida. Such Final Judgment awarded attorneys' fees, costs and "damages" to Appellee.

Notwithstanding the pendency of the appeal with respect to the Final Judgment, and without seeking an Order of the Court of Appeal granting leave for the lower tribunal to conduct further proceedings as required by Rule 9.600, Appellee sought and obtained a Contempt Order for Appellant's failure to pay the sums specified in the Final judgment. That Contempt Order, entered May 30, 1984, also sentenced Appellant to jail. (A copy of the Contempt Order is annexed hereto as Exhibit "A".)

Appellant timely filed with the Circuit Court a notice of appeal from the May 30, 1984 Order. The notice was styled an Amended Notice of Appeal (hereinafter "Amended Notice", Exhibit "B" hereto) which clearly specified that, by such notice, Appellant was appealing from both the Final Judgment and the Contempt Order.

The record on appeal was transmitted to the District Court, and Appellant's Initial Brief was filed on or about September 18, 1984. The Initial Brief addressed all issues on appeal with respect to the Final Judgment and the Contempt Order.

On September 25, 1984, Appellee made a Motion to Strike Appellant's Amended Notice of Appeal (Exhibit "C" hereto). This motion was Appellee's first objection to the Amended Notice of Appeal which was filed 112 days earlier. Such motion urged as grounds that Appellant improperly attempted to appeal from the Contempt Order. Appellee stated that proper procedure required that a separate notice of appeal be filed pursuant to Rule 9.130, and that an additional fee be paid. Significantly, **Appellee's Motion to Strike did not allege any prejudice which resulted from alleged defects, or that Appellee was in any way misled by the Amended Notice of Appeal.**

On November 1, 1984, the Fourth District Court of Appeal granted Appellee's Motion To Strike The Amended Notice Of Appeal (Exhibit "D" hereto). As the time for appealing the Contempt Order has long since expired, granting Appellee's Motion to Strike has the result of dismissing the appeal from the Contempt Order and denying for any appeal from such Order. The appeal is plainly meritorious because it seeks review of a Contempt Order which is invalid on its face.

In his "Motion For Reconsideration Or In The Alternative Motion For Leave To File Amended Notice Of Appeal And For Consolidation" (hereinafter "Motion For Reconsideration" Exhibit "E" hereto), Appellant moved the lower court for relief from its Order of November 1, 1984, insofar as such Order granted Appellee's Motion to Strike the Amended Notice of Appeal. Appellant urged the court to reconsider that Order which resulted

in the disallowance of a meritorious appeal on the basis of non-jurisdictional, non-prejudicial defects. Rather than dismiss a good, valid and subsisting appeal, Appellant requested that the court disregard these procedural errors or defects as permitted by Rule 9.040(d), Fla.R.App.P.¹, and enter an Order vacating and setting aside the erroneously entered Order. In the alternative, Appellant moved the court pursuant to Rule 9.040(d) to enter a further Order to allow Appellant to amend the notice of appeal and file the balance of fees, if any, to cure such defects and allow the appeal in its entirety to be disposed of on its merits.

ARGUMENT

I. The Fourth District Court of Appeal Departed From the Essential Requirements of Law By Striking An Amended Notice Of Appeal For Non-Prejudicial, Non-Jurisdictional Defects.

Appellee moved to strike the Amended Notice of Appeal on the basis that a separate notice of appeal pursuant to a different Rule should have been filed with respect to the Contempt Order together with the applicable fees. In her Response to the Motion for Reconsideration (Exhibit "F" hereto), Appellee again failed to state that she was in any way misled or in the slightest degree prejudiced². Notwithstanding the absence of any harm caused to Appellee by the Notice, by Order dated December 6, 1984 (Exhibit "G" hereto), the Fourth District Court of Appeal denied the Motion for Reconsideration.

At no time has Appellee stated that she was misled as to Appellant's intention to perfect an appeal from the Contempt Order. At no time has Appellee stated that she suffered any prejudice, however slight, from this Amended Notice.

The striking of the Amended Notice has resulted in the dismissal of an appeal from a Contempt Order invalid on its face. The Order utterly fails to make the findings required by this

¹Hereinafter, all Rules cited are Florida Rules of Appellate Procedure and shall be designated simply as "Rule ___".

²Appellee's Response sets forth as its sole argument that the Amended Notice was insufficient because it was filed only in the District Court. Appellee has falsely stated the facts. The record plainly demonstrates that the Amended Notice was timely filed with the Clerk of the Circuit Court. Such a misrepresentation to the District Court or any court should not be tolerated.

Court's opinion in Faircloth v. Faircloth, 336 So.2d 650 (Fla. 1976), and its progeny. For this reason, the Order should be quashed and the merit of the appeal is undeniable.

The defects in the Amended Notice complained of simply do not merit such a harsh result. There can be no dispute that if instead of the Amended Notice, a separate notice of appeal together with the filing fees were filed in the exact manner that the Amended Notice was filed, the appeal from the Contempt Order would have been perfected.

The defects, if any, are simply not jurisdictional. (See Section II, infra.)

If the Amended Notice of Appeal had any defects, such defects should have been ignored or cured to allow the court to reach the substantive issues. If by the Amended Notice an improper remedy was sought, the District Court was charged by Rule 9.040(c) to treat the notice as seeking the proper remedy. (See Section IV, infra.) Rule 9.040(d) allows the District Court to ignore such defects, or to permit amendment to cure the defects so that the appeal may be disposed of on its merits. (See Section V, infra.) Finally, Rule 9.040(h) specifically provides that failure to timely file fees or additional copies of notices is not jurisdictional. (See Section III, infra.)

In Robbins v. Cipes, 181 So.2d 521, 522 (Fla. 1966), this Court enunciated the principles to govern whether defects in a notice warrant dismissal of an appeal:

. . . Where the examination of the notice of the appeal and other appellate documents such as assignments of error, briefs and other pertinent papers show that the parties have not been misled or prejudiced by any deficiencies or ambiguities in the notice itself, the dismissal of such an appeal would not only be contrary to prior precedents of this Court but inconsistent with the true administration of justice (emphasis supplied).

The record in this case is devoid of any suggestion that Appellee was misled or prejudiced. This fact has the most eloquent proof possible: Appellee herself has never stated that she was misled or prejudiced. Clearly, the order of the District Court contravenes this Court's rulings and, in so doing, approves loss of the Constitutional right to appeal on the basis of mere

technicalities. Such a departure from the essential requirements of law can and should be remedied by this Court in exercise of its jurisdiction to issue writs of certiorari. Milar Galleries, Inc. v. Miller, 349 So.2d 170(Fla. 1977).

Such a dismissal is contrary to the rules and purposes of appellate procedure. Puga v. Suave Shoe Corp., 417 So.2d 678 (Fla. 3rd DCA 1982). In Milar Galleries v. Miller, supra, 349 So.2d at 171, this Court stated that so long as the parties have received notice of the appeal and have not been prejudiced by technical defects,

the dismissal of such an appeal is inconsistent with the proper concept of appellate review and with the proper administration of justice (citations omitted).

The record plainly demonstrates that the Amended Notice of Appeal was sufficient to put the Appellee on notice. Citing Milar, supra, the Fifth District Court stated that the purpose of a notice of appeal is to disclose to an adverse party that an appeal from an adverse order or judgment is intended. Jones v. State, 423 So.2d 520, 522 (Fla. 5th DCA 1982). The test of whether a notice meets this purpose is

whether it gives the adverse party and the appellate court sufficient information to identify with a reasonable degree of certainty the order or judgment intended to be appealed (citations omitted). Id.

The Amended Notice of Appeal in the instant case plainly meets these tests. The Appellee and the District Court have been unambiguously informed of the orders being appealed, and the Notice's purpose has been served.

Having received notice, and having suffered no prejudice, Appellee has offered no grounds to support the dismissal of this appeal or any part thereof. To allow such a dismissal would be to contravene the strong public and judicial policy that appeals

should be determined on their merits, instead of upon irrelevant technicalities.

Puga v. Sauve Shoe Corp., supra, 417 So.2d at 679.

Accordingly, the District Court's Order granting of Appellee's Motion to Strike was erroneous, and should be quashed.

II. The Defects About Which Appellee Complains
Are Non-Jurisdictional Defects Not Grounds For
Dismissal Because Appellee Has Suffered No Prejudice.

It is well-established that

defects in the notice of appeal are not to be
considered jurisdictional defects, or grounds for
dismissal, unless the complaining party was substan-
tially prejudiced.

Ratner v. Miami Beach First National Bank, 362 So.2d 273, 274 (Fla. 1978). This Court in Ratner held that an appeal should not be dismissed if an examination of the notice and other appellate documents demonstrates that the complaining party was not misled or prejudiced.

As stated above, the record is devoid of the slightest suggestion that Appellee was misled or prejudiced in any manner or to any extent. Appellee urges that two notices of appeal and an additional fee were required. However, Appellee utterly fails to indicate the slightest prejudice to her which resulted from Appellant's departure from technical requirements of the Rules. Similarly, Appellee does not urge that the Amended Notice of Appeal was misleading. Appellee had received Appellant's Initial Brief one week prior to making her Motion to Strike. Yet she does not suggest that the brief addressed issues beyond the scope of the Amended Notice of Appeal: Appellant is prosecuting precisely the appeal presaged by the Amended Notice of Appeal.

Under these circumstances, given the absence of Appellee being misled or prejudiced, the defects are plainly non-jurisdictional. Indeed, in the case of Burlingham v. Allen, 295 So.2d 684 (Fla. 1st DCA 1974), a motion to dismiss was made on the ground that the appeal from two separate judgments required two separate notices of appeal. The First District Court agreed with the complaining party's contention that a single notice was defective, but went on to hold that such a defect was not jurisdictional. Similarly, in the instant case, even if two separate notices of appeal were required, Appellee's failure to file such separate notices did not deprive the District Court of jurisdiction.

III. Failure of Appellant to Pay Two Filing Fees Did Not Deprive The District Court Of Jurisdiction Over the Instant Appeal.

Appellee also urged that the Amended Notice of Appeal should be stricken because Appellant failed to pay the additional fee which would have been required if a separate notice of appeal had been filed with respect to the Contempt Order. The question of whether additional fees were required or paid does not bear on the issue of the court's jurisdiction, however. Rule 9.040(h) clearly provides that the "failure of a clerk or a party timely to file fees. . . shall not be jurisdictional". This Court specifically held that failure to pay the fees is not grounds for dismissal. Williams v. State, 324 So.2d 74, 77 (Fla. 1975):

Henceforth, the notice of appeal timely filed without simultaneous payment of the filing fee or the filing of an adjudication of insolvency shall act to vest jurisdiction in the respective appellate court.

Thus, Appellee's complaint that an additional fee should be paid was not grounds to grant the Motion to Strike and effectively dismiss a meritorious appeal.

IV. If, as Appellee Alleges, Appellant Sought an Improper Remedy, Such a Defect is Not Grounds For Dismissal.

Appellee further urges that the Amended Notice of Appeal is defective because the appeal from the Contempt Order should be a Rule 9.130 appeal. Without conceding the correctness of this position, Appellant asserts that the contention is of no force and effect. Rule 9.050(c) states:

If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought (emphasis supplied).

This Rule is mandatory. Pridgen v. Board of County Commissioners of Orange County, 389 So.2d 259, 260 (Fla. 5th DCA 1980), reh. den., 397 So.2d 777 (Fla. 5th DCA 1981). Accordingly, if Appellant's Amended Notice of Appeal seeks an improper remedy, it must be treated as if the proper remedy was sought, and the defect, if any, cannot support dismissal of the appeal.

V. The District Court Should Have Disregarded the Procedural Errors or Defects Complained of by Appellee, or Granted Leave to Appellant to Cure Such Defects.

A. The District Court Should Have Disregarded The Procedural Errors or Defects as Permitted by Rule 9.040(d).

Rule 9.040(d) makes provision for the treatment of procedural errors or defects in a manner that permits appeals to be disposed of on the merits rather than on "irrelevant technicalities". This Rule states:

At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.

Appellant urges that this case would have been most appropriately treated if the District Court had to disregard the procedural errors or defects cited by Appellee. As stated above, no prejudice or misleading of Appellee has resulted. Therefore, such disregard of the defects by the District Court simply could not have an adverse effect on any rights of Appellee, and certainly not with respect to her substantial rights.

On the contrary, the District Court's choosing to dispose of the appeal of the Contempt Order on the basis of "irrelevant technicalities" resulted in a meritorious appeal being precluded by non-jurisdictional, non-prejudicial defects. Such a result has the profound adverse effect on the substantial, Constitutionally-guaranteed right of Appellant to appeal the Contempt Order. Such a result is a manifest departure from the essential requirements of the law.

The record in this case establishes that the equitable result in this case would be for the District Court to disregard whatever procedural errors or defects it finds with respect to the Amended Notice of Appeal. As set forth above, the appeal had been prosecuted before the District Court almost to its conclusion prior to the Motion to Strike. The record for the entire appeal was before the District Court. Appellant's Initial Brief as to all issues on appeal had been in the hands of this Court since September 18, 1984.

Appellee waited until the eleventh hour of this appeal

to attack, on the basis of procedural defects which are nothing more than "irrelevant technicalities", Appellant's Amended Notice of Appeal. No excuse or explanation is offered for this delay. Appellant urges that Appellee's Motion to Strike should have been denied by reason laches in addition to the herein set forth reasons. Appellee allowed the Record to be prepared and transmitted and Appellant's Initial Brief to be filed before she chose to call into question the first step of the appellate process. Prior to this tardy challenge, the parties and the District Court were poised to take the last steps of the appellate journey. Accordingly, Appellant respectfully urges this Court to quash the Order of the District Court striking the Amended Notice of Appeal and further ordering that court to disregard the procedural errors or defects so that this entire appeal may proceed to disposition on the merits expeditiously and with judicial economy.

B. If The District Court Declined To Disregard Procedural Errors Or Defects, It Should Have Permitted Appellant To Amend The Notice Of Appeal So That This Cause, In Its Entirety, Could Be Disposed Of On Its Merits.

Rule 9.040(d), cited above, embodies the principal enunciated in Jones v. State, supra, that procedural defects should not be a bar to the disposition of a case on the merits. The Rule provides (emphasis supplied):

At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the results.

The Committee Notes to this Rule goes on to state that "Amendments should be liberally allowed under this rule" (emphasis supplied). In Bowen v. Bowen, 352 So.2d 166, 167 (Fla. 1st DCA 1977), dism., 360 So.2d 1247 (Fla. 1978), the First District Court specifically held that amendments under this Rule can be made in notices of appeal:

This and other courts of Florida have also repeatedly held that non-jurisdictional defects in notices of appeal may be cured by amendment where it does not appear that the appellee has either been misled or prejudiced by the defect (citations omitted).

The Bowen court went to allow the amendment of a notice that

sought review of a denial of a motion for new trial so that it properly sought review of the underlying final judgment.

Courts have specifically allowed a single notice of appeal to be amended so that two separate notices of appeal could be filed. Burlingham v. Allen, supra, 295 So.2d 684. The Burlingham court granted Appellant thirty (30) days within which to file two separate amended notices and to deposit the balance of the filing fees with the clerk of court.

Appellant urges that, failing disregard of the alleged defects, that the District Court should have ordered Burlingham-type relief be afforded to Appellant.

VI. Appellant Will Be Irreparably Harmed If
This Amended Notice Of Appeal Remains Stricken.

Not only will Appellant have lost the Constitutionally protected right to appeal the Contempt Order if the Amended Notice remains stricken, he has now been ordered to jail because of the District Court's order. Upon receiving the Order granting Appellee's Motion to Strike, Appellee moved to vacate the stay by the trial court of the Contempt Order during the pendency of the appeal. As the appeal no longer pends, the trial court on January 3, 1985, ordered Appellant to jail for his failure to pay a judgment which is the subject of the appeal which remains pending in the District Court³. Appellant has been ordered to jail despite the fact that the Final Judgment does not award alimony or child support. Such jailing plainly contravenes the Constitutional prohibition against imprisonment for debt.

Finally, no other adequate remedy is available to Appellant. Although the Fourth District Court of Appeal's order striking the Amended Notice of Appeal directly conflicts with this Court's opinions in Ratner v. Miami Beach First National Bank, supra, 362 So.2d 273 and Milar Galleries v. Miller, supra, 349 So.2d 170, as well as the opinions of other District Courts, discretionary jurisdiction to resolve the conflict created by an unreported decision is rarely invoked. Appellant has timely

³As of the date of this submission, the trial court had not rendered its order sentencing Petitioner to jail. An excerpt from the hearing transcript containing the substance of the court's ruling is annexed hereto as Exhibit "H".


sought such relief, but cannot be assured that such relief will be granted and must seek to have this Court invoke its power to issue a common law writ of certiorari to correct this departure from the essential requirements of law.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Petitioner JOSEPH VETRICK, respectfully requests this Court to grant this Petition for Writ of Certiorari and enter an Order quashing the order of the Fourth District Court of Appeal which strikes his Amended Notice of Appeal.

Respectfully submitted,

Dated: January 7, 1985


PATTI A. VELASQUEZ, ESQUIRE
P. O. Drawer 2377
Palm Beach, Florida 33480
Telephone (305) 833-6203

Attorney for Petitioner
JOSEPH VETRICK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to James P. O'Flarity, Attorney for Former Wife, 215 Fifth Street, Suite 108, West Palm Beach, Florida 33401, this 7th day of January, 1985.


PATTI A. VELASQUEZ, ESQUIRE