IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,654

THE STATE OF FLORIDA,

Petitioner,

vs.

E.W.M., a juvenile,

Respondent.

FILED
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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, E.W.M., was the Juvenile Respondent in the Juvenile Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida and the Appellee/Respondent in the Third District Court of Appeal of Florida. Petitioner, the State of Florida, was the prosecution in the trial court and the Appellant/Petitioner in the district court. In this brief, the parties will be referred to as they appear before this court.

The symbol "R" will be used, in this brief, to refer to the Record-on-Appeal and the symbol "T" will identify the transcript of trial court proceedings. The appendix to this brief will be referred to as "App." and by the Exhibit letter assigned. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

A Petitioner for Delinquency was filed against the Respondent on August 17, 1984, charging him with Possession of Cannabis (not more than twenty grams)(Count I) and Possession with Intent to Sell Marijuana (Count II). (R.1). A sounding was held on September 7, 1984, at which time the public defender was appointed and the respondent

offered no plea so the court entered a plea of denial on his behalf. (R.2).

The case came on for trial on October 4, 1984. (T.1). The defense announced that, if it could take the deposition of Officer Brown that morning, they would be ready to proceed. (T.2-4). The State then stated, after announcing ready, that the chemist in the case was also sitting outside. (T.5). The State explained that arrangements had already been made the day before for the defense to take the deposition of Officer Brown that morning. (T.6). Also, Officer Brown, had taken the evidence to the crime lab to be analyzed the day before. (T.6). The court noted that the State had two witnesses (T.7), although he believed that they had announced one. (T.7).[1] The defense requested a Richardson inquiry due to the fact that they had only been informed about the chemist that morning (T.7), and the State responded that the name of the chemist had only become known to the State that morning, since the evidence had only been analyzed the previous afternoon. (T.7). The State noted that it had only given the defense five (5) minutes to speak to the chemist (T.8), so the judge adjourned to permit the defense to take the depositions of both witnesses. (T.9-10).

[1]It should be noted that no such announcement appears in the record. (T.1-7).

Court reconvened for the Richardson hearing on the witnesses. (T.10). The State admitted that it had not previously listed any witnesses from the crime lab, that such a witness should have been listed, and moved to amend its discovery response to list the previously unlisted chemist. (T.11), noting that the name of the chemist was unkown to the State until that morning. (T.11).

The Judge announced that he would not allow the expert from the crime lab to testify and proceeded to trial. (T.12, R.9). The prosecutor asked to change its previous announcement to not ready and moved for a continuance. (T.12). Defense objected to a continuance since they had a witness present with whom they had problems, and the Respondent was present. (T.12). The Judge denied the State's motion and the State announced not ready in light of the court's ruling. (R.12). The trial court then dismissed the case (T.12, R.8), and the State filed its Notice of Appeal. (R.5).

Subsequently, the Public Defender moved to dismiss the case in the Third District Court of Appeal on the grounds that there is no authority for the state to appeal, which was granted by the Third District Court of Appeal on February 20, 1985. (App., Exh. A). However, the district court certified the question to this court of, "Does the

State have the authority to file plenary appeals in juvenile cases, and, if not, may this court review by certiorari an order dismissing a petition for delinquency?" (App., Exh. B).

Petitioner reserves the right to argue additional facts in the argument portion of this brief.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE APPEAL WITHOUT DETERMINING IF THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN EXCLUDING THE CRIME LABORATORY CHEMIST DUE TO AN ALLEGED DISCOVERY VIOLATION, WHERE HE PERFORMED THE TEST CONCERNED ON THE PREVIOUS AFTERNOON, HIS NAME ONLY BECAME KNOWN TO THE STATE ON THE MORNING OF TRIAL AND THE DEFENSE WAS GIVEN AN OPPORTUNITY TO TAKE HIS DEPOSITION PRIOR TO TRIAL?

SUMMARY OF THE ARGUMENT

The district court erred in dismissing the case *sub judice* without determining if the standards for common-law certiorari had been met, since an appeal improvidently taken is considered a petition for common-law certiorari and the standards concerned were clearly met, in this case.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE APPEAL WITHOUT DETERMINING IF THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN EXCLUDING THE CRIME LABORATORY CHEMIST DUE TO AN ALLEGED DISCOVERY VIOLATION, WHERE HE PERFORMED THE TEST CONCERNED THE PREVIOUS AFTERNOON, HIS NAME ONLY BECAME KNOWN TO THE STATE ON THE MORNING OF TRIAL AND THE DEFENSE WAS GIVEN AN OPPORTUNITY TO TAKE HIS DEPOSITION PRIOR TO TRIAL.

Since the requirements for common-law certiorari could clearly have been met in the case _sub judice_, the Third District Court of Appeal reversibly erred in entering an order of dismissal before determining if the trial court had departed from the essential requirements of law in excluding a witness who was critical to the State's case.

The Constitution of the State of Florida provides for appellate and extraordinary writ jurisdiction in the district courts of appeals, as follows:

> (b) JURISDICTION.
> (1) 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. They may

> review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.
>
> Constitution of the State of Florida (1968), Art. V, §4(b)(1).

> ....A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.
>
> Constitution of the State of Florida (1968), Art. V, §4(b)(3).

These provisions constitute an update of similar provisions in the Constitution of 1885, which provided:

> (3) Jurisdiction. Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, 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.
>
> The supreme court shall provide for expeditious and inexpensive procedures in appeals to the district courts of appeal, and may provide for review of such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

> The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.
>
> A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.
>
> Constitution of the State of Florida (1985), Art. V, §5(3).

The old section was held to constitutionally guarantee the right of appeal in a case in which this court stated that statements and rules regulating the exercise of appellate rights should be liberally construed in favor of the appealing party. Robbins v. Cipes, 181 So.2d 521 (Fla. 1966). Further, it has long been settled that an appeal that is improvidently taken shall be treated by the reviewing court as a petition for writ of certiorari. Ogle v. Pepin, 273 So.2d 391 (Fla. 1973); Ross v. Bowling, 233 So.2d 415 (Fla. 3d DCA 1970). This court holds that it, not the legislature, has the sole authority under the Constitution for deciding what appeals may be taken (from interlocutory orders). In Interest of R.J.B., 408 So.2d 1048 (Fla. 1982). Therefore, it is easy to understand why improvident appeals are treated as petitions for certiorari, since all

appellate review is by appeal except where review by certiorari is permitted, certiorari being the traditional proceeding by which to obtain review of orders, judgements and decrees of inferior tribunals. Thomas Jefferson, Inc. v. Hotel Employees Union, 81 So.2d 731 (Fla. 1955); Powell v. Civil Service Board of Escambia County, 154 So.2d 917 (Fla. 1st DCA 1963); Pullman Company v. Fleishel, 101 So.2d 188 (Fla. 1st DCA 1958).

However, recent cases from this court have seemed to indicate that, in certain classes of actions (juvenile cases, dismissals of probation violation cases), the State not only has no right to appeal, but it has no right to petition the appellate courts for certiorari, either. Jones v. State, 10 F.L.W. 565 (Fla. Oct. 17, 1985); State v. G.P., 10 F.L.W. 469 (Fla. Aug. 30, 1985); J.P.W. v. State, 10 F.L.W. 486 (Fla. Aug. 30, 1985); State v. C.C., 10 F.L.W. 435 (Fla. Aug. 29, 1985). These cases appear to hold that this court does not determine the State's right to appeal on the grounds that such right is purely statutory. State v. C.C., 10 F.L.W. 435 (Fla. Aug. 30, 1985). Further, despite F.S. §2.01, which purports to adopt the common-law remedies, such as petition for certiorari, these cases appear to abrogate the right of the people of Florida (through their representative, the State) to seek review by certiorari in those cases in which they are not entitled to an appeal as a

matter of right. Jones v. State, 10 F.L.W. 565 (Fla. Oct. 17, 1985); State v. G.P., 10 F.L.W. 469 (Fla. Aug. 30, 1985); J.P.W. v. State, 10 F.L.W. 486 (Fla. Aug. 30, 1985). It is respectfully submitted, in accordance with Justice Boyd's concurring opinion in the Jones case, that this Court did not intend to overturn many decades of well-established common-law doctrine on the subject of the writ of certiorari by holding that, when there is no entitlement to appeal, certiorari is ipso facto not available as a remedy. Instead, the more reasonable interpretation would be that, in the above-referenced cases, the court found that the situations did not meet the standards for common-law certiorari and, therefore, were not reviewable by that method. This interpretation harmonizes the position this Court has taken in the above-referenced actions with its previous position that the constitutional definitions of jurisdiction of courts is controlling and certiorari may issue to review a judgement of the circuit court where no appeal or writ of error is provided by law. South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675 (Fla. 1939).

This position is also consistent with other prior holdings, throughout the previous decades, on the subject. Where it clearly appears that there is no adequate and complete remedy by appeal, the court will consider granting a writ of certiorari. (emphasis added). Brooks v. Owens, 97

So.2d 693 (Fla. 1957). Certiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasi judicial proceeding and is available to obtain review in situations when no other method of appeal is available (emphasis added). De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957). In determining whether to consider a petition for writ of certiorari, the District Court of Appeal should not narrowly construe the rule that only departures from the essential requirements of law should be considered so as to apply only to violations which deny appellate review or pertain to regularity of procedure; the district courts should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Combs v. State, 436 So.2d 93 (Fla. 1983). The writ will lie to review all interlocutory orders of circuit courts. Greater Miami Development Corporation v. Pender, 194 So. 867 (Fla. 1940). The Florida Appellate Rules do not abrogate the jurisdiction of the District Courts of Appeal to review by certiorari interlocutory orders at common-law where it is clearly apparent that there has been a departure from the essential requirements of law, and the petitioner does not have a full and adequate remedy by appeal after judgement. Shell v. State Road Department, 135 So.2d 857 (Fla. 1961). Where the judgement of the circuit court is rendered without or in excess of its jurisdiction, is a palpable miscarriage of

justice, or is illegal or essentially irregular and violates established principles of law, and may reasonably and probably result in substantial injury to the legal rights of the petitioner, and there is no other adequate remedy at law, the common-law writ of certiorari will lie. Janet Realty Corporation v. Hoffman's, Inc., 17 So.2d 114 (Fla. 1943). Common-law certiorari is a discretionary writ that will be issued to review nonfinal orders where there is a clear showing that the body below departed from the essential requirements of law, resulting in material harm, for which remedy by appeal would be inadequate. In Interest of J.S., 404 So.2d 1144 (Fla. 5th DCA 1981); Pet. for rev. dismissed, 412 So.2d 467 (Fla. 1982): If an order was to be viewed as departing from the essential requirements of law, review was available by common-law certiorari. Gordon v. Barley, 383 So.2d 322 (Fla. 5th DCA 1980).

While it is certainly correct that a petition for certiorari is no substitute for appeal since, for one thing, certiorari will not lie to review the judgement of an inferior court if there is any other adequate remedy. Lewis v. Lewis, 78 So.2d 711 (Fla. 1955). Further, common-law certiorari will be issued only in exceptional cases, such as where an interlocutory order does not conform to the essential requirements of law and may cause material injury throughout subsequent proceedings for which an appeal will

be inadequate. Kauffman v. King, 89 So.2d 24 (Fla. 1956). It may not be used to challenge findings of fact unless the fact-finding process has been marred by a departure from essential procedural requirements. Chicken 'N' Things v. Murray, 329 So.2d 302 (Fla. 1976).

Public policy also supports this view, since traditional policy, based upon traditional concepts of fairness, is clearly in favor of allowing both parties to an action some sort of appellate review. Indeed, if there are clases of cases, such as juvenile, where the people of Florida through their representative, the State, have no opportunity to seek review, then the trial courts become the final arbiter and supreme authority on all issues, including those of Constitutional dimension (so long as they err against the State). This is the specific situation abhorred by Justice Shaw in State v. White, 470 So.2d 1377 (Fla. 1985), footnote 1. It is respectfully suggested that justice is not furthered by putting trial court judges throughout the state on notice that, if they err on the side of the defense, there is no danger that they will be either criticized or reversed by the appellate courts. However, should they err on the side of the State, reversal and criticism become distinct possibilities.

Further, certiorari has been specifically held to be the appropriate vehicle for testing the correctness of orders governing discovery procedures. (Although here, the order concerned is a dismissal, the dismissal was entered because the State could no longer proceed since a critical witness was excluded due to an alleged discovery violation.) (R.8, 9; T.11-12). Greyhound Lines, Inc. v. Jackson, 445 So.2d 1107 (Fla. 4th DCA 1984); City of Williston v. Roadlander, 425 So.2d 1175 (Fla. 1st DCA 1983).

In the case *sub judice*, there was clearly an essential departure from the requirements of law which effectively prevented the State from being able to prosecute its case.

Rule 8.070, Fla.R.Juv.P. provides:

> (a) Required Disclosure to Child.
>
> (1) After the filing of a petition alleging a child to be delinquent and prior to the adjudicatory hearing, the petitioner shall disclose to the child or his counsel upon written demand within five (5) days, and permit him to inspect, copy, test, and photograph, the following information and material within the petitioner's possession or control:
>
> > (i) The names and addresses of all persons known to the petitioner to have information which may be relevant to the allegations or to any defense with respect thereto.

It also provides for the sanction of prohibiting a party from calling a witness who was not disclosed. Rule 8.070(i)(1)(iv) Fla.R.Juv.P. Here, the trial court applied this rule to exclude the crime laboratory chemist from testifying (T.11-12), despite the fact that no written demand for discovery was filed (R.),[1] and the fact that the witness only became known to the assistant state attorney that morning. (T.7). Further, the trial court specifically gave the defense an opportunity to take the deposition of the chemist (T.9), the defense neither alleged nor proved that it suffered any prejudice (T.), nor did the defense move for any continuance (T.). The State's motion for continuance was denied. (T.12).

This court has consistently held that the Rules of Criminal Procedure must not be given such a strict interpretation as to harm the State when the end result will not be to prejudice the defendant. State v. Bruno, 107 So.2d 9 (Fla. 1958). Thus, permitting an unlisted State witness to testify has never been held to be reversible error where it would not prejudice the defense. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Leeman v. State, 357 So.2d 703 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976); cert. denied, 431 U.S. 925 (1977). This analysis has specifically

[1]A subsequent check of the State's file has revealed that a written discovery demand was served on the State, although not placed in the Record. It is attached to a motion to supplement being submitted.

been applied to failures to furnish the defense with the names of chemists or laboratory reports where the failure did not prejudice the defendant. United States v. Kubiak, 704 F.2d 1545 (11th Cir. 1983); Cert. denied, 104 S.Ct. 163 (1983); Savinon v. State, 277 So.2d 58 (Fla. 3d DCA 1973).

Certainly, there is no question that the State's non-compliance with the rule concerning the exchange of witness lists does not entitle the defendant, as a matter of right, to have the nonlisted witness excluded. Richardson v. State, 246 So.2d 771 (Fla. 1971). Also, where, as here, the information concerned was not within the possession of the State until the morning of trial (or, at the earliest possible moment, the prior afternoon), the State cannot be required to disclose information which is not yet in its possession. State v. Maier, 366 So.2d 501 (Fla. 1st DCA 1979).

In this case, although the court announced (after permitting the defense to take any depositions it wished) that it was holding a Richardson hearing (T.10), the defense never indicated in any manner that it was prejudiced by the State's previous failure to list the chemist, nor was it required to. (T.10-13). Thus, the trial court violated the rule that requires it to conduct a full inquiry before determining the appropriate sanction and that it must

determine if prejudice has been occasioned before excluding evidence. Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985); Plummer v. State, 454 So.2d 61 (Fla. 1st DCA 1984); Pet. for rev. denied, 461 So.2d 116 (Fla. 1985); Carroll v. State, 414 So.2d 247 (Fla. 4th DCA 1982); Pet. for rev. denied, 426 So.2d 28 (Fla. 1983); State v. Snell, 391 So.2d 299 (Fla. 5th DCA 1980); Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1980); Adams v. State, 366 So.2d 1236 (Fla. 2d DCA 1979).

Although the trial court did not technically dismiss this action for the alleged discovery violation, its action had the same practical effect, since it placed the State in a "not ready" posture and its subsequent motion for continuance was denied. (T.11-13). Therefore, the cases holding that dismissal is inappropriate as a discovery sanction unless prejudice to the defense is shown would appear to apply. State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA 1984); Pet. for rev. denied, 453 So.2d 45 (Fla. 1984); State v. Banks, 418 So.2d 1059 (Fla. 2d DCA 1982); Pet. for rev. denied, 424 So.2d 760 (Fla. 1982); State v. Lowe, 398 So.2d 962 (Fla. 4th DCA 1981); Collier v. State, 353 So.2d 1219 (Fla. 3d DCA 1977). However, even if this were not the case, the trial court is required to make a full inquiry prior to excluding witnesses. Bradford v. State, 278 So.2d 624 (Fla. 1973). The extreme sanction

of exclusion for failure to comply with discovery rules should never be used except on the most extreme cases, where no other remedy suffices to remove the prejudice caused. O'Brien v. State, 454 So.2d 675 (Fla. 5th DCA 1984); Pet. for rev. denied, 461 So.2d 116 (Fla. 1984); Patterson v. State, 419 So.2d 1120 (Fla. 4th DCA 1982); Pet. for rev. denied, 430 So.2d 452 (Fla. 1983); State v. Plachta, 415 So.2d 1356 (Fla. 2d DCA 1982); State v. Bowers, 422 So.2d 9 (Fla. 2d DCA 1982); Williams v. State, 376 So.2d 441 (Fla. 4th DCA 1979); Kruglak v. State, 300 So.2d 315 (Fla. 3d DCA 1974). Also, where, as here, the defense is furnished access to the previously unknown material and an opportunity to make use of it (T.9), any prejudice to the defense is properly removed. United States v. Coronel, 750 F.2d 1482 (11th Cir. 1985); Webb v. State, 433 So.2d 496 (Fla. 1983); State v. Del Gaudio, 445 So.2d 605 (Fla. 3d DCA 1984); Pet. for rev. denied, 453 So.2d 45 (Fla. 1984); King v. State, 355 So.2d 831 (Fla. 3d DCA 1978); Cert. denied, 354 So.2d 887 (Fla. 1978).

There is certainly no question that the State's case was irreparably damaged by the exclusion of the chemist. Even if we assume that the arresting officer could have been qualified as an expert in the identification of marijuana (a doubtful assumption, at best), the State was absolutely required to introduce the marijuana as evidence, since it

was available. G.E.G. v. State, 417 So.2d 975 (Fla. 1985); Morra v. State, 467 So.2d 742 (Fla. 3d DCA 1985). Since the contraband concerned had been analyzed by the chemist the previous afternoon (T.7), the State couldn't even establish the necessary chain of custody without his testimony, which was excluded. (T.11-12). Therefore, along with having departed from the essential requirements of law in excluding the chemist, it is crystal clear that the trial court not only irreparably damaged the State's case by the exclusion, but virtually destroyed any possibility of going forward. (T.10-13).

It is therefore, clear that, had the Third District Court of Appeal examined the merits of this case, it would have been led to the inescapable conclusion that the requirements of common-law certiorari had been met and that the issuance of a writ of certiorari was required in the interests of justice. Since it dismissed the action concerned before ever determining this issue, it should now be required to do so.

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this court should reverse the decision of the Third District Court of Appeal and remand the case for proceedings consistent with the finding that the standards for common-law certiorari are applicable and have been met.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to BETH WEITZNER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 14th day of November, 1985.

CHARLES M. FAHLBUSCH
Assistant Attorney General

/vbm