IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 66,691

ROBERT WILLIAM HUME,

Respondent.

CONSOLIDATED

ROBERT WILLIAM HUME,

Petitioner,

vs. CASE NO. 66,704

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

CASE NO. 66,704

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0290

COUNSEL FOR RESPONDENT/STATE OF FLORIDA

TOPICAL INDEX

AUTHORITIES CITED

CASES

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PRELIMINARY STATEMENT

Robert William Hume, the criminal defendant and appellee below will be referred to herein as Petitioner. The State of Florida, the prosecution and appellant below will be referred to herein as Respondent.

An appendix containing the opinion of the court below, reported as State v. Hume, 10 F.L.W. 357 (Fla. 1st DCA Feb. 11, 1985), has been attached hereto. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s). Citations to Petitioner's jurisdictional brief will be indicated parenthetically as "PB" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

For purposes of resolving the narrow jurisdictional issued raised herein, Respondent accepts as accurate Petitioner's Statement of the Case and Facts (PB 2,3). However, Respondent objects to Petitioner's assertion that the lower court refused to address his previously successful argument (PB 3) as being conclusory and argumentative.

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke this Court's discretionary review pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(ii) on the ground that the decision below expressly construed search and seizure guarantees of both the federal and Florida Constitutions.

SUMMARY OF ARGUMENT

Petitioner, while ostensibly seeking review based upon the lower court's having construed controlling provisions of the federal and Florida Constitutions, advances instead a host of policy considerations as reasons for this Court's exercise of its discretionary jurisdiction. Petitioner also suggests that review might also be predicated upon an alleged conflict between this Court's decision in State v. Sarmiento, 397 So.2d 643 (Fla. 1981) and the lower court's decision.

Initially, Respondent argues that the lower court merely applied controlling constitutional provisions and that application, as opposed to construction is insufficient for purposes of invoking this Court's jurisdiction. Respondent further argues that the reasons set forth by Petitioner as grounds for review are uncompelling and fail to establish a basis for this Court's discretionary review under Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(ii). Lastly, Respondent argues that by operation of Article I, Section 12 of the Florida Constitution, as amended, Sarmiento is uncontrolling and therefore not in conflict with the lower court's decision herein.

ISSUE ON APPEAL

PETITIONER HAS FAILED TO ESTABLISH THE NECESSARY BASIS FOR INVOKING THIS COURT'S JURISDICTION PURSUANT TO ARTICLE V, SECTION 3(b)(3) OF THE FLORIDA CONSTITUTION AND FLA.R.APP.P. 9.030(a)(2)(A)(ii).

Petitioner seeks to invoke this Court's discretionary review pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(ii) on the ground that the decision below expressly construed search and seizure guarantees of both the federal and Florida Constitutions (PB 1).

It is well established that to successfully invoke this Court's jurisdiction on this ground, it is necessary that the decision below actually construe, as distinguished from apply, a controlling provision of either the federal or Florida Constitutions. Armstrong v. City of Tampa, 106 So.2d 407, 409, 410 (Fla. 1958). Accord Ogle v. Pepin, 273 So.2d So.2d 391, 392, 393 (Fla. 1973); Rojas v. State, 288 So.2d 234, 236 (Fla. 1973); Dykman v. State, 294 So.2d 633, 634, 635 (Fla. 1973).[1] In Armstrong, this Court held:

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[1]While the foregoing cases were decided when the "express construction of the federal or Florida Constitutions" was a basis for this Court's exercise of its mandatory review, see for example Art. V, §3(b)(1), Fla. Const. (1973), Respondent maintains that they are still binding authority notwithstanding the fact that this ground now serves as a basis for this Court's discretionary, rather than mandatory, review. See Art. V, §3(b)(3), Fla. Const. (1983)

Our study of the decisions of courts of other states operating under very similar constitutional provisions leads us to the conclusion that in order to sustain the jurisdiction of this court under the quoted provision it is necessary that the final decree under assault actually construe, as distinguished from apply, a controlling provision of the Constitution. We had occasion to consider the matter in Milligan v. Wilson, Fla.1958, 104 So.2d 35; and in Carmazi v. Board of County Commissioners, Fla.1958, 104 So.2d 727. In the cited cases we undertook to point out that the mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the trial court does not in and of itself convey jurisdiction by direct appeal to this court. We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution.

* * *

In other words, actual construction of the language of the Constitution, either state or federal, must be involved to justify the jurisdiction of the Supreme Court. It is not sufficient to sustain our jurisdiction merely to point to a set of facts and contend that the trial judge failed to apply correctly a recognized provision of the Constitution. To convey jurisdiction to this court by direct appeal it is necessary that the trial judge actually construe or interpret a section of the Constitution and then apply his construction to the factual situation presented to him. Any contrary veiw could conceivably result in bringing practically every erroneous decree or judgment directly to this court. This is so because it could be contended that in practically every instance

> where error has been committed the offended party has in some measure been denied due process of law. Hence, because of the denial he might well contend that the due process clause of the Constitution had been "construed" and that jurisdiction here resulted. Certainly, such a situation was not contemplated by the recent Amendment to the Judiciary Article of our Constitution. (Emphasis added).

Id at 409, 410.[2] Accord Ogle, Rojas and Dykman. See also Croteau v. State, 334 So.2d 577, 581 (Fla. 1976), Hatchett, J., concurring, where Justice Hatchett, citing the foregoing authority, made the following observation which is particularly apposite to this case:

> Ordinarily a trial court implicitly construes Art. I § 12 of the Florida Constitution and the Fourth Amendment to the United States Constitution in deciding a motion to suppress illegally seized evidence. That fact alone does not give this Court jurisdiction of the appeal.

Turning now to the case at bar, it is patently clear that the lower tribunal construed neither the federal nor the Florida Constitution (A 2,3). Rather, the court applied Article I, Section 12, to the facts of the case and determined that the trial court erred in finding the intercepts complained of sub judice to be inadmissible under this Court's decision in State v. Sarmiento, 397 So.2d 643 (Fla. 1981), since the United States Supreme Court's decision in United States v. White, 401 U.S. 745 (1971), rehearing denied, 402

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[2]This Court recognized the continued viability of the "Armstrong rule" in Ogle v. Pepin, supra, at 393.

U.S. 990 (1971), held that such intercepts were not violative of the Fourth Amendment to the United States Constitution (A 2, 3). Indeed, nothing in the First District's decision amounts to construction of either the federal or Florida Constitutions as that term was defined in Armstrong--a state of affairs evidently recognized by Petitioenr who, rather than establishing the lower court's construction of a constitutional provision, merely advanced a series of reasons why this Court should accept jurisdiction of this case, none of which would compel it to do so under Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(ii).

Petitioner first suggests that exercise of this Court's discretionary jurisdiction in necessary to provide a definitive pronouncement and thereby promote statewide understanding concerning the continued viability of State v. Sarmiento, supra, in light of the Amendment to Article I, Section 12 (PB 4). Respondent submits that Petitioner's concerns in this regard are not well founded in view of the fact that the district courts confronted with this issue have had no difficulty in determining, pursuant to Article I, Section 12, that contrary United States Supreme Court authority[3] mandated Sarmiento's

[3]United States v. White, supra; Lopez v. United States, 373 U.S. 427 (1963).

demise. State v. Ridenour, 453 So.2d 193 (Fla. 3d DCA 1984); State v. Hume, supra.

Petitioner next appears to take issue with the lower court's perceived failure to address his "studied review" and "detailed examination" of the evolution of the Supreme Court decisions addressing the propriety of warrantless electronic eavesdropping under the Fourth Amendment and complains that this "cursory treatment in the First District's opinion" deprived its constituent trial courts of authoritative guidance should they ever be confronted with an argument predicated on such an evolutionary study (PB 5). Respondent, to the contrary, contends that the trial courts have not been cast adrift to fend for themselves in the face of a maelstrom of judicial indecision. Instead, they can save themselves harmless from strandingupon the shoals of reversible error by following the course charted by Ridenour and Hume, to-wit: when confronted with the issue of admissibility of intercepted communications like those complained of here, they need only look to and rule in accord with United States Supreme Court authority which is dispositive of the issue.

Petitioner also suggests that the issue involved herein deserves resolution by this Court because it contemplates matters of constitutional dimension as well as matters affecting the right of privacy and security of every citizen in the State (PB 5). Inasmuch as the citizenry, through their approval of the amendment of Article I, Section 12,

have demonstrated their trust in the United States Supreme Court to vouchsafe their rights in relation to Fourth Amendment issues, Petitioner's concerns are once again unfounded. Certainly Petitioner cannot be suggesting that this Court, even if so inclined, could or would author an opinion purporting to overrule decisions of the United States Supreme Court on the issue in question. In any event, none of Petitioner's reasons even facially serve to establish a basis for this Court to exercise its discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030(a)(2)(A)(ii) since they utterly fail to demonstrate that the lower court expressly construed controlling provisions of the Federal or Florida Constitutions.

Finally, Respondent notes that Petitioner contends that this Court's discretionary review of this cause might properly lie pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) on the basis that the lower court's decision is in express and direct conflict with this Court's decision in State v. Sarmiento, supra, (PB 2, 3, note 1). Petitioner would be correct in his contention but for the fact that Article I, Section 12 as amended renders Sarmiento uncontrolling in view of United States Supreme Court decisions[4] which this Court recognized would permit the admission of Sarmiento type intercepts. See Odom v. State, 403 So.2d 936, 939

[4]Hoffa v. United States, 385 U.S. 293 (1966); United States v. Caceres, 440 U.S. 741 (1979); United States v. White, supra; Lopez v. United States, supra.

(Fla. 1981).

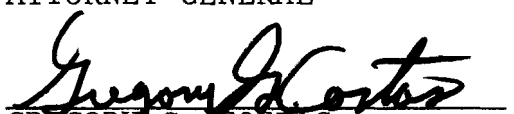
CONCLUSION

Based upon the foregoing argument and the authority cited herein Respondent contends that Petitioner has failed to establish the necessary predicate for the exercise of this Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution and Fla.R.App.P. 9.030 (a)(2)(A)(ii).

WHEREFORE, Respondent respectfully requests this Honorable Court decline to exercise its discretionary review of the instant cause.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL



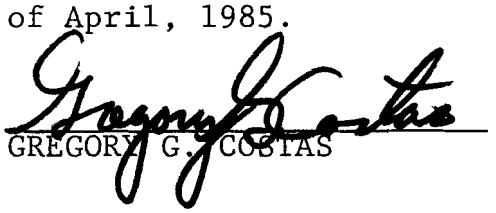
GREGORY G. COSTAS
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0290

COUNSEL FOR RESPONDENT/STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Thomas W. Kurrus and Larry G. Turner, Suite 6, 204 West University Avenue, Gainesville, Florida 32602, this 24th day of April, 1985.



GREGORY G. COSTAS