

SUPREME COURT OF FLORIDA

VINCENT FRANCIS GALLO,)
Petitioner,)
v.)
STATE OF FLORIDA,)
Respondent.)
_____)

CASE NO. 67,254

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PETITIONER'S REPLY BRIEF

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ISSUE I.

THIS COURT SHOULD REVIEW ALL ISSUES PRE-
SENTED BY PETITIONER.

In their Answer Brief, under Issues II, III and IV, the Respondent argues that this Court should confine its scope or review strictly to the certified question from the Fourth District Court of Appeals. In support of this argument, Respondent relies upon State v. Hegstrom, 401 So.2d 1343 (Fla.1981), however, in the omitted portion of Respondent's cite from Hegstrom, supra, this Court noted that it would not grant review on one basis and the reweigh evidence "...in order to avoid ruling on the legal issues which provoked our jurisdiction". Hegstrom at 1344.

In the instant case, jurisdiction of this Court is involved through Art. V §3(b)(4), Fla.Const., which clearly states that the Supreme Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance..." (emphasis added) As stated in Rupp v. Jackson, 238 So. 2d 86,88 (Fla. 1970), "...it is this certified question which then acts as a vehicle to bring the entire decision before the Court." The Petitioner is not seeking review of issues not properly before this Court, and as such, all arguments contained in the Initial Brief need full consideration and deliberation.

The two cases which Respondent relies upon, Hegstrom, supra and Sobel v. State, 437 So.2d 144 (Fla. 1983), deal with conflict jurisdiction under Art. V §3(b)(4), Fla. Const. As in the case of jurisdiction by certified question, it is important to note that in

Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977), this Court stated, "[i]f conflict [certified question] appears and this Court acquires jurisdiction, we then proceed to consider the entire cause on the merits." The Bould, supra, Court supported this notion by citing from Tyus v. Apalachicola Northern Railroad Company, 130 So.2d 580 (Fla. 1961), whereby it was stated,

"...it becomes our duty and responsibility to consider the case on its merits and decide the points passed upon by the District Court which were raised by appropriate assignments of error as completely as though such case had come originally to this Court on appeal. Tyus, at 585. (See also Trusylin v. State, 425 So.2d 1126 (Fla. 1982).

The jurisdiction of this Court has been clearly established and the scope of review is required to extend to all issues raised by the Petitioner. To answer the certified question properly, it is incumbent upon this Court to consider these issues which pertain to the error and create the foundation upon which to decide the certified question.

ISSUE II.

THERE WAS AN EFFECTIVE OBJECTION TO THE JURY INSTRUCTION.

Respondent argues in several places in their Answer Brief that there was not a valid objection to the trial judge's inclusion of jury instructions on lesser included offenses. It is Petitioner's contention that there was an effective objection and that the trial record will support this position.

The reliance of Respondent upon Fla.R.Crim.P. 3.390(d), is well founded; however, the objectives of that rule are not to be construed as strictly as Respondent urges. In State v. Heathcoat, 442 So.2d 955,956 (Fla. 1983), it was stated, "...that the objectives of the contemporaneous objection rule are to "appraise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." The Court further states that the record must be unambiguous and clearly show that the Court understood and denied the request.

The trial record in the instant case indicates that both defense counsel and the defendant urged the Court not to instruct on lesser included offense, and the State agreed. The statement made by counsel for the State (referred to "as his somewhat flippant statement" in Respondent's brief) indicated the State's consent to the waiver of the instructions on the lesser offenses. It wasn't until the judge indicated that he felt the inclusion of those instructions was necessary, that the State refuted the prior consent. At that point, the defendant was denied his right to the waiver, which his trial counsel felt was in his best interest. The judge, who supposedly acts as an unbiased referee, imposed his authority and was able to influence the State's

prior decision to the detriment of the defendant.

As this issue has been presented to the Fourth District Court of Appeals, and is the underlying foundation of the certified question to this Court, the Respondent's argument that there was not an effective preservation by objection at trial, is without merit.

ISSUE III.

RESPONDENT HAS MISINTERPRETED PETITIONER'S
ARGUMENT AND MISLEAD THIS COURT.

In Issue III of Respondent's Answer Brief, there was reference to Issue III of Petitioner's Brief and how the argument contained therein was absolutely wrong. Respondent has misread the case law supporting Petitioner's Issue III and misinterpreted its use in the Brief.

Petitioner relies upon Bragg v. State, 433 So.2d 1375 (Fla. 2d DCA 1983), for the proposition the Florida Statutes §794.011(5), is not a necessarily included offense of §794.011(3). Smith v. State, 365 So.2d 405 (Fla. 3rd DCA 1978), is cited by Petitioner as support for the argument that since the conviction was for an offense not necessarily included, it was fundamental error and the conviction must be reversed.

When the trial judge, over the defense objections, took it upon himself to instruct the jury on lesser offenses, it was incumbent upon him to do so in the proper manner and use the proper lesser offenses. The instructions given were full of error and now must be rectified so as to provide the Petitioner with all of the benefits of his due process of law.


CONCLUSION

As to Issue I, this Court should review all issues presented on appeal by Petitioner. The certified question is the vehicle which invokes jurisdiction of this Court. As such, the entire decision of the Fourth District Court of Appeals is properly before the Court and is necessary for a meaningful and complete deliberation of the certified question.

In Issue II, Petitioner asserts that the trial court was appraised of the objection to the inclusion of instructions on lesser offenses and once the State agreed to the waiver, the trial court should have acquiesced to defendant's waiver. As this waiver created the foundation of the certified question, this Court should review these issues.

Respondent has misinterpreted the argument and caselaw contained in Petitioner's Initial Brief, Issue III. The Answer Brief is incorrect and is misleading the Court as to this issue.

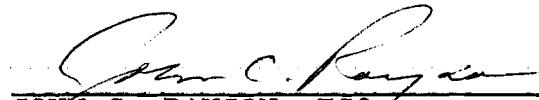
Respectfully submitted,



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 18 day of October, 1985 to ROBERT S. JAEGER, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida 33401.



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