IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,417

THE STATE OF FLORIDA,

Petitioner,

vs.

MARLOW K. SMULOWITZ,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

* *

BRIEF OF PETITIONER ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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OTHER AUTHORITIES

INTRODUCTION

The Petitioner, the State of Florida, was the Appellant in the District Court of Appeal and the prosecution in the trial court. The Respondent, Marlow K. Smulowitz, was the Appellee in the District Court and the defendant in the trial court. The parties will be referred to as they stand before this court. The symbol "A" will be used to designate the appendix to this brief. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent was charged with second degree murder. Respondent then moved, purportedly filed pursuant to Florida Rule of Criminal Procedure 3.190, the trial court to reduce the charges, pretrial, from second degree murder to simple battery. The trial court granted the motion and reduced the charge. (A.1).

Petitioner then appealed to the Third District, alleging the trial court's action in reducing, pretrial, the charges was unauthorized by law. The trial court, sua sponte,[1] dismissed this appeal. The grounds for dismissal

[1]As the briefs of the parties evidence, the issue of the right to appeal was never raised by either party. (A.4-27). Further, Respondent filed for rehearing alleging the State had a right to appeal. (A.28-29).

were since the State's right to appeal is purely statutory and no such right exists concerning an appeal of an order reducing a charge contained in the information, the State was not entitled to appeal an alleged ultra vires act of the trial court. Further, the District Court held that since the State had no right to appeal, the instant appeal could not be treated a petition for certiorari. However, the following question was then certified. (A.2).

> Where the trial court enters an order allegedly not authorized by law, may the State obtain review by certiorari of the order from which appeal by the State is not legislatively authorized? (A.2).

A stay of mandate was entered by the Third District. (A.3). A notice to invoke the discretionary jurisdiction of the court was filed and jurisdiction was accepted.

POINTS INVOLVED ON APPEAL

I

WHERE THE TRIAL COURT ENTERS AN ORDER ALLEGEDLY NOT AUTHORIZED BY LAW, MAY THE STATE OBTAIN REVIEW BY CERTIORARI OF THE ORDER FROM WHICH APPEAL BY THE STATE IS NOT LEGISLATIVELY AUTHORIZED.

II

WHETHER THE STATE HAS A RIGHT TO APPEAL A PRETRIAL ORDER REDUCING CHARGES PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.140(c)(1) INASMUCH AS A PRETRIAL ORDER REDUCING THE CHARGES CONTAINED IN AN INFORMATION IS THE SAME AS A PRETRIAL ORDER DISMISSING A COUNT OF AN INFORMATION.

SUMMARY OF THE ARGUMENT

The trial court granted a sworn motion to reduce charges. Pursuant thereto, the State appealed. The district court dismissed the appeal for lack of jurisdiction. Said court refused to treat the appeal as a petition for common law certiorari on the grounds that the same was unauthorized since the State had no statutory right to appeal. The Court certified the following question:

> Where the trial court enters an order allegedly not authorized by law, may the State obtain review by certiorari of the order from which appeal by the State is not legislatively authorized.

The certified question should be answered affirmatively. Rule 9.030(b)(3), Fla.R.App.P. provides that the District Court has original jurisdiction to issue the common law writ of certiorari. Since common law certiorari is an action of original jurisdiction, no statutory authorization is needed to permit the State the right to seek the discretionary review provided by in the writ. The only limitations on common law certiorari is that there is no right to appeal, that the trial court order departs from the essential requirements of law and that said order irremediably prejudices the State in the presentation of its case.

Additionally, the State does have a right to appeal since a pretrial reduction of charges is the same as dismissal charges and therefore is appealable as a matter of right. See Rule 9.140(1)(a)(1), Fla.R.App.P.

ARGUMENT

I

WHERE THE TRIAL COURT ENTERS AN ORDER ALLEGEDLY NOT AUTHORIZED BY LAW, MAY THE STATE OBTAIN REVIEW BY CERTIORARI OF THE ORDER FROM WHICH APPEAL BY THE STATE IS NOT LEGISLATIVELY AUTHORIZED?

In State v. Smith, 260 So.2d 489 (Fla. 1972), the State filed an interlocutory appeal from a pretrial discovery order. The First District held it lacked jurisdiction to entertain the appeal and dismissed it. However, the District Court treated the appeal as a petition for common law certiorari and held that the order did not depart from the essential requirements of law and denied the petition.

Upon review, this Court agreed with the District Court's holding that the State had no right to appeal. This Court reasoned as follows:

> [1] The District Court of Appeal held the statute unconstitutional, reasoning that it was ineffective unless a rule of this Court "breathes life" into the legislative act. We agree and adopt the following portion of the opinion rendered by the District Court of Appeal:

The instant appeal sought by the State is not from a final judgment, and is not one appealable directly to the Supreme Court or to a Circuit Court. Jurisdiction of this Court to entertain interlocutory appeals from pretrial orders is dependent upon the Supreme Court providing for such review. Has the Supreme Court so provided? We conclude that it has not.

The sole provision promulgated by the Supreme Court for appellate review of pretrial orders in criminal cases is found in Rule 6.3 subd. b, 32 F.S.A.

1. Rule 6.3 subd. b, Florida Appellate Rules, reads:

> 'b. Appeals pursuant to Section 924.071, Florida Statutes 1967, shall be taken within the time prescribed in subsection a. above, or prior to the commencement of the trial whichever is sooner. The procedure for such appeals shall be as provided in Rule 4.2. Such appeals shall be given priority on the docket.'

This Rule breathes life into a legislative Act which purports to permit appellate

2. F.S. §924.071, F.S.A.

review of a pretrial order which quashes a search warrant, suppresses evidence

obtained by search and seizure, or suppresses a confession or admission made by a defendant.

The legislature has sought to provide apellate review of other pretrial orders entered in criminal

3. F.S. § 924.07(8), F.S.A.

cases through enactment of Section 924.07(8), which provides:

> 'All other pretrial orders, except that it may not take more than one appeal under this subsection in any case . . . .'

The Supreme Court has not as of this date adopted or implemented this legislative declaration of public policy.

Appellate review of any order or judgment entered by a trial court is not a right derived from the common law. The right of appellate review is derived from the sovereign; i. e., the citizens of this State. By means of Article V of the Florida Constitution, the citizens have granted to a litigant as a matter of right appellate review of a final judgment. The sovereign has decreed that 'The supreme court . . . may provide for review by courts of interlocutory orders . . . .' (Emphasis theirs.)

This explicit provision is clearly substantive and not procedural. The Constitution does not authorize

> Levin and Amsterdam, Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U.Pa.L.Rev. 1, 14 (1958).

> the legislature to provide for interlocutory review. Any statute purporting to grant interlocutory appeals is clearly a declaration of legislative policy and no more. Until and unless the Supreme Court of Florida adopts such statute as its own (as it did with regard to Section 924.071), the purported enactment is void.
>
> 260 So.2d at 490-491.

However, this Court, even though the District Court, in its treatment of the appeal at a petition for common law certiorari found that the order did not depart from the essential requirements of law, reviewed the propriety of the discovery order and found the trial court discovery order departed from the essential requirements of law. The Court then quashed the District Court's Order denying the petition and instructed the District Court to grant the writ of certiorari and quash the trial court's order.

Smith's rule of law is that this Court must enact a rule of procedure in order to "breath life" into section 924.07(8), Florida Statutes, the enabling statute, in order for the State to have a right to appeal all pretrial orders not specifically covered by Sections 924.07(1-7) and 924.071 Florida Statutes (1983) and Rule 9.140(c)(1), Fla.R.App.P. (1983). See also R.J.B. v. State, 408 So.2d 1048 (Fla. 1982); State v. G.P., 429 So.2d 706, 787 N.4 (Fla. 3d DCA

1983). Further, that without the enactment of a rule of law, the State may seek review under the higher standard of common law certiorari.

The foregoing rule of law is the rational conclusion to and totally reconcilable with this Court's most recent pronouncement on the issue in State v. Creighton, 469 So.2d 735 (Fla. 1985). In Creighton, this Court reaffirmed the rule of law that the State's right to appeal in criminal cases depends on statutory authorization and is governed strictly by statute. At first blush, this holding seems to conflict with that of Smith, however, upon closer scrutiny, no conflict exists.

In Creighton, the State sought to appeal on an order granting a motion for judgment of acquittal. This Court found that since neither of the enabling statutes, sections 924.07, and 924.071, Florida Statutes (1981), provides for the right to appeal from order granting judgment of acquittals, an appeal from such an order is not authorized and is simply not available. Since the enabling statutes did not even authorize such an appeal, this Court was not faced with and therefore no discussion was necessary of the situation involved in Smith, to wit: the right to appeal where there

is an enabling statute but no Supreme Court rule to "breath life" into said section.[2]

Therefore, in order to determine whether an appeal is authorized. Creighton and Smith must be read in pari materia. Upon such a reading it is clear that in the instant case, section 924.07(8) is the enabling statute which authorizes this Court to adopt a rule of procedure giving the State a right to appeal all other pretrial orders not previously provided for by rule of court. It is also clear that as of this date this Court has not adopted any appel-
late rule which would "breath life" into section 924.07(8) and therefor the type of interlocutory appeal sought by Petitioner herein is not permitted.[3]

The State submits that in the case sub judice, there is wisdom in providing a procedural vehicle for allowing the

[2]It is evident that State v. Smith, supra, is still good law, when one considers the how right of the State to appeal sentences deviating from the guidelines was handled. In In re Amendment to Rules of Appellate Procedure (9.140), 443 So.2d 972 (Fla. 1983), this court, in the face of enabling legislation, section 921.001 Florida Statutes (1983), permitting the State to appeal a sentence deviating from the guidelines adopted rule 9.140(J), as the necessary rule of procedure to "breath life" into the legislature.

[3]The State would point out that if this interpretation is wrong, and Creighton overruled Smith, than the State does have a right to appeal the pretrial order in question. This is so because the legislature has authorized said appeal by enacting section 924.07(8).

State to appeal pretrial orders which are alleged to be ultra vires. If no such vehicle is provided, then the trial courts are given a free reign, with no checks thereon, to enter any pretrial order whether authorized by law or not. To permit this would be unfair to all parties to a criminal case, since the law in each case would be subject to the different philosophies of the many different trial judges. This lack of uniformity would be devastating to the proper administration of the criminal justice system. As such, the State implores this Court, in this case, to adopt a rule of law "breathing life" into section 924.07(8), thereby giving the State a right to appeal ultra vires pretrial orders. See Avilla South Condominium Ass'n Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1976)(This court invalidated section 711.12(2) Florida Statutes (1975) and section 718.111(2) Florida Statutes (1976 Supp) on the ground that said statutes dealt with matters of procedure. However, this Court found wisdom within the statute for providing said procedures and therefore this Court adopted the substance of the statutory sections invalidated as a rule of procedure). See also Carter v. Sparkman, 335 So.2d 802 (Fla. 1976).

If this Court does not deem necessary the establishment of a rule of procedure enabling the State to appeal pretrial orders under the broad standard of review contemplated by

section 924.33 Florida Statutes,[4] then it can limit the scope of review to the question of whether the lower court proceeded in a manner contrary to the essential requirements of law. To do this, this Court need only to clearly state that common law certiorari is an available means to seek review of pretrial orders, where appeal from said orders are not legislatively authorized. To so hold would be a logical conclusion to the issue of the State's right to seek review of pretrial orders where appeal therefrom is not provided for.

The writ of common law certiorari issues from a court holding appellate jurisdiction to an inferior court and order the lower court to send up the record in a case, where an appeal or writ of error is not available, for a determination of whether the lower court exceeded its jurisdiction or proceeded in a mannter contrary to the essential requirements of law. Harrison v. Fink, 75 Fla. 22, 77 So. 663 (1918); Kilgore v. Bird, 149 Fla. 570, 6 So.2d 541 (1972); Malone v. Costin, 410 So.2d 569 (Fla. 1st DCA 1982). This rule of law has been incorporated into the State

[4]Section 924.33 Florida Statutes state:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all appeal papers, that error was committed that injuriously affected the substantial rights of appellant. It shall not be presumed that error injuriously affected the substantial rights of appellant.

Constitution and the Rules of Appellate Procedure in such a manner as to cover review in all situations in which an appeal is not available.

Article V, Section 4(b)(3) of the Florida Constitution provides:

> (b) Jurisdiction.--
>
> (3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable from the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the jurisdiction of the court. 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.

This Court, by enacting Rule 9.030(b)(2) and (3), Fla.R.App.P., has provided the procedural vehicle to effectuate the foregoing emphasized section of Article V, section (4)(b)(3) Florida Constitution. Rule 9.030(b)(2) and (3) provide:

> (2) Certiorari Jurisdiction. The certiorari jurisdiction of district courts of appeal may be sought to review:

(A) non-final orders of lower tribunals other than as prescribed by Rule 9.130;

(B) final orders of circuit courts acting in their review capacity

(3) Original jurisdiction: District Courts of appeal may issue writs of mandamus, prohibition, quo warranto, common law certiorari, and all writs neco.2d 633 (Fla. 1962)(Passage of section 924.07 Florida Statutes does not and was not intended to proscribe the authority of the State to seek common law certiorari in the District Court).

The right to seek common law certiorari by the State of adverse interlocutory orders has been so limited. The first limitation is that there is no right to appeal. The second limitation is that the trial court's actions have departed from the essential requirements of law to the irremediable prejudice of the State to prosecute its case. If these limitations are met, a case is subject to certiorari review. State v. Hohl, 431 So.2d 707, 709 N1 (Fla. 2d DCA 1183); State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982);

tion is the only one supported by the law.

Rule certiorari, as provided for by Rule 9.030(b)(2), is limited by its terms to review interlocutory orders in civil cses, where appeals have been authorized by law, section 59.02(3), Florida Statutes (1969) and to review the merits final orders of circuit courts acting in their appellate capacity. State v. J.W.P., supra. The review envisioned by Rule certiorari is a review having all the

elements of an appeal. Wilson v. McCoy Mfg. Co., 695 So.2d 659 (Fla. 1954).

Common law certiorari, as provided for by Rule 9.030(b)(3), by its terms, is a action of original jurisdiction. As such it affords redress on a broader basis than Rule certiorari inasmuch as original jurisdiction is jurisdiction to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts. It is not dependent on a final adjudication by a lower court. Blacks Law Dictionary, pages 90 & 991 (5th Edition 1979). Since common law certiorari is an original proceeding with the District Court, the scope of that jurisdiction is only limited by the confines with which the writ has been circumscribed by common law. State v. J.P.W., supra. See also State v. Harris, 136 So.2d 633 (Fla. 1962)(Passage of section 924.07 Florida Statutes does not and was not intended to proscribe the authority of the State to seek common law certiorari in the District Court).

The right to seek common law certiorari by the State of adverse interlocutory orders has been so limited. The first limitation is that there is no right to appeal. The second limitation is that the trial court's actions have departed from the essential requirements of law to the irremediable prejudice of the State to prosecute its case. If these limitations are met, a case is subject to certiorari review.

State v. Hohl, 431 So.2d 707, 709 N1 (Fla. 2d DCA 1183); State v. Steinbrecher, 409 So.2d 510 (Fla. 3d DCA 1982); State v. Wilcox, 351 So.2d 89 (Fla. 2d DCA 1977); State v. Williams, 442 So.2d 240 (Fla. 5th DCA 1983).

In accordance with the foregoing analysis, there is no authority for the State to petition for rule certiorari to seek review of adverse pretrial orders. However, it is equally clear that the State has authority to petition for common law certiorari to seek review of adverse pretrial orders. This conclusion must be reached in order to insure the proper and uniform process of the administration of the criminal justice system. By allowing the State to seek review by the discretionary writ of common law certiorari, this Court will insure that only the most serious pretrial rulings in criminal cases will be reviewable. This will insure uniformity and at the same time prevent wholesale review by the State of all adverse pretrial rulings. Failure to permit such a review would have a devastating effect on the criminal justice system inasmuch as justice would depend on the judge and not the law. Said policy reason, if insufficient to warrant a rule of procedure to provide a right to appeal, is certainly sufficient to provide the State with a discretionary right to review adverse pretrial order.

The instant case meets the requirements for common law certiorari. First, the State has no right to appeal adverse

pretrial orders which are not specifically enumerated in Rule 9.140(c) and since the instant order is not so listed, there is no right to appeal. See State v. Smith, supra. The next determination that must be made is whether the action of the trial court in reducing the charges departed from the essential requirements of law to the irremediable prejudice of the State to prosecute its case.

The trial court granted Respondent's Rule 3.190(c)(4) motion to reduce the charges contained in the information from second degree murder to battery. This action by the trial court was unauthorized because the only relief which may be granted under a Rule 3.190(1)(4) motion is the dismissal of an indictment or information or of a count thereof. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981). A pretrial order reducing charges in an information is not authorized because the discretion of a prosecutor is deciding whether and how to prosecute is absolute and is an incident of the constitutional separation of powers. Therefore, trial courts are not permitted to interfere with the free exercise of the discretionary power on how to prosecute. State v. Cain, 381 So.2d 1361, 1367, N.8 (Fla. 1980). A motion to dismiss an information, on the other hand, is a challenge directed at whether the facts relied upon by the State constituted a crime and whether the evidence offered to prove it establishes a prima facie case of guilt. It is not an attack on the discretion to file

the charge. State v. Davis, 243 So.2d 587 (Fla. 1971). When an information is dismissed on the grounds that the facts known to the prosecutor is insufficient to establish a prima facie case of guilt, the State may refile said information provided additional facts are established. However, the State may appeal said dismissal contending that the facts did establish a prima facie case of guilt. But, if no appeal is taken from the dismissal, and no new facts are adduced by the State, a refiled information based on the same facts or a dismissed information is barred by the doctrine of res judicata. State v. Gellis, 375 So.2d 885 (Fla. 3d DCA 1979).

By reducing the charges, instead of dismissing the information, the trial court precluded the State from review by appeal. Fla.R.App.P. 9.140(c)(1)(A), section 924.07(1) Florida Statutes (1983). Without an appeal to determine if the facts established a prima facie case of guilt against Respondent for second degree murder, the trial court's ruling thereon is final and irremediably prejudiced the State's prosecution. This is so because, without review, the State is forced to prosecute on the reduced charge, which action is in derogation of the prosecutor's discretion on how to charge. This is not to say that the trial court is without authority to grant relief to Respondent. However, said relief is authorized post-trial via motions for judgment of acquittal, new trial, for arrest of judgment, or

the charge. State v. Davis, 243 So.2d 587 (Fla. 1971). When an information is dismissed on the grounds that when the evidence sustains only conviction a lesser offense. See Fla.R.Crim.P. 3.380, 3.590, 3.610 and 3.620. Thus, in any of the foregoing instances, the determination is made only after there has been a trial. No such proceeding occurred herein, yet the trial court reduced the charges. Therefore, the ruling departed from the essential requirements of law.

Since the trial court was without authority to enter the pretrial order reducing the charge, by doing so the trial court left the State at the peril of irrevocable prejudice, and therefore certiorari is appropriate. State v. Vinson, 320 So.2d 50 (Fla. 2d DCA 1975), aff'd, Vinson v. State, 345 So.2d 711 (Fla. 1937). This prejudice is irrevocable, since without adding new facts, it will never be determined whether the trial court correctly found the evidence insufficient to establish a prima facie case of guilt against the Respondent for second degree murder. Therefore, this Court should clearly state that allegedly unauthorized pretrial orders are subject to review by petition for common law certiorari.

II

THE STATE HAS A RIGHT TO APPEAL A PRETRIAL ORDER REDUCING CHARGES PURSUANT TO FLORIDA RULES OF APPELLATE PROCEDURE 9.140(c)(1), INASMUCH AS A PRETRIAL ORDER REDUCING THE CHARGES CONTAINED IN AN INFORMATION IS THE SAME AS A PRETRIAL ORDER DISMISSING A COUNT OF AN INFORMATION.

Florida Rules of Criminal Procedure, 3.190(c)(4) provides that a motion to dismiss an indictment or an information, or any count thereof, may be granted when:

> (4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the dfendant. The facts on which such motion is based should be specifically alleged and the motion sworn to.

When a sworn motion to dismiss is granted, the State has several options to pursue. First, the State may, without appeal, refile the information with additional facts to establish a prima facie case of guilt. State v. Davis, supra. If the State disagrees with the trial court's ruling that the facts failed to establish a prima facie case of guilt, such order may be appealed. Fla.R.App.P. 9.140(c)(A)(1). Section 924.07(1) Florida Statutes (1983). If the appellate court reverses the granting of the motion to dismiss, the dismissed information is reinstated.

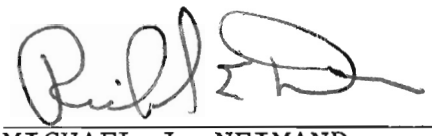
In the instant case, the trial court granted Respondent's sworn motion to reduce charges from second degree murder to battery. The grounds were that the undisputed facts did not establish a prima facie case of guilt of second degree murder. The result of this action was the same as if the trial court dismissed the information. That is the State could either proceed on the reduced charges, or refile a new information charging second degree murder as long as new facts supported the charge. Furthermore, since this was a pretrial ruling, it is no different from an order dismissing a count of an information and therefore should be appealable pursuant to Rule 9.140(c)(A)(1). See State v. Harris, 439 So.2d 265 (Fla. 2d DCA 1983)(Trial court's order of acquittal was for all practical purposes nothing more than a second order arresting judgment, thereby permitting State appeal therefrom.). State v. Sherrod, 383 So.2d 752 (Fla. 4th DCA 1980)(Trial Court order dismissing charges against defendant after two trials resulted in mistrial because of hung jury was not a judgment of acquittal but would be trated as an applicable order dismissing the information.).

CONCLUSION

Based upon the foregoing points and authorities, the State respectfully requests that this Court answer the question certified in the affirmative and quash the trial court's order reducing the crime from second degree murder to battery.

Respectfully submitted,

JIM SMITH
Attorney General



FOR MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to ROBERT H. MARTIN, Attorney for Respondent, 8362 Mills Drive, Miami, Florida 33183, on this 16th day of August, 1985.

FOR MICHAEL J. NEIMAND
Assistant Attorney General

/vbm

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner,

vs.

MARLOW K. SMULOWITZ,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

APPENDIX

JIM SMITH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1985

TUESDAY, JULY 30, 1985

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 84-1176
MARLOW K. SMULOWITZ,	**	
Appellee.	**	
	**	

Upon consideration appellant's motion to stay mandate pending review is granted.

A True Copy

ATTEST:

Clerk District Court of
Appeal, Third District

cc: Michael J. Neimand
Robert H. Morton

/hb

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1985

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 84-1176
MARLOW K. SMULOWITZ,	**	11th JCC+ # 82-39173
Appellee.	**	

Opinion filed July 23, 1985.

An Appeal from the Circuit Court for Dade County, Robert H. Newman, Judge.

Jim Smith, Attorney General, and Michael J. Neimand, Assistant Attorney General, for appellant.

Robert Hall Martin, for appellee.

DOC 7/24/85 Attorney General

Before HUBBART, NESBITT and BASKIN, JJ.

RECEIVED
JUL 24 1985
ATTORNEY GENERAL
MIAMI OFFICE

BASKIN, Judge.

In this appeal, the state challenges the trial court's reduction of a criminal charge contained in an information filed against defendant Smulowitz. Upon motion, purportedly filed pursuant to Florida Rule of Criminal Procedure 3.190, the trial court reduced the charge from second degree murder to battery. The state maintains

that the trial court's action is unauthorized by law,* and that the only appropriate relief which may be granted under rule 3.190(c) is dismissal of an indictment or information. State ex rel. Bludworth v. Kapner, 394 So.2d 541, 543 (Fla. 4th DCA 1981). We do not reach the issue because the state's right to seek appellate review in a criminal case is purely statutory, State v. Creighton, 10 FLW 257 (Fla. May 2, 1985); State v. Jones, 467 So.2d 1083 (Fla. 1st DCA 1985); State v. C.C., 449 So.2d 180 (Fla. 3d DCA 1983), and the statute makes no provision for the state to appeal an order reducing a charge contained in an information. § 924.07, Fla. Stat. (1981); Fla. R. App. P. 9.140(c)(1). See Creighton; State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976). Furthermore, the court may not treat an appeal as a petition for certiorari where there is no statutory authority to consider the appeal. Jones; C.C.; State v. G.P., 429 So.2d 786 (Fla. 3d DCA 1983).

Accordingly, we dismiss the state's appeal and certify the following question which we deem to be of great public importance:

> WHERE THE TRIAL COURT ENTERS AN ORDER ALLEGEDLY NOT AUTHORIZED BY LAW, MAY THE STATE OBTAIN REVIEW BY CERTIORARI OF THE ORDER FROM WHICH APPEAL BY THE STATE IS NOT LEGISLATIVELY AUTHORIZED?

Appeal dismissed.

*In State v. McQuay, 403 So.2d 566 (Fla. 3d DCA 1981), this court upheld the trial court's reduction of a charge pursuant to a 3.190(c)(4) motion to dismiss. In that case, however, appellant did not question whether the rule authorized the court to reduce the charge.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 84-1176

THE STATE OF FLORIDA,

Appellant,

vs.

MARLOW K. SMULOWITZ,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

* *

INITIAL BRIEF OF APPELLANT

JIM SMITH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Assistant Attorney General
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Appellant, the State of Florida, was the prosecution in the trial court. The Appellee, Marlow K. Smulowitz, was the defendant below. The parties will be referred to as they stood before the lower court. The symbol "R" will be used to designate the Record on Appeal. The symbol "T" will be used to designate the transcript of proceedings. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

An information was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida charging the defendant with the second degree murder of one Robert F. Patton. (R. 2-2a). The basis for the charge was that between September 24 and 25, 1982 the defendant struck the victim about the body, which caused him to lose consciousness. The victim was in a comatose state from the time of his beating through his stay at the Intensive Care Unit of Jackson Memorial Hospital. As a result of his injuries the victim, on November 26, 1982, met his demise. (R. 4).

On April 4, 1984, the defendant filed, under Fla.R. Crim.P. 3.190 (c)(4), a Sworn Motion to Reduce the Charge to Battery. The motion was a narrative by defense counsel

consisting of a recitation of the facts contained in the depositions of the witnesses. It was not sworn to by the defendant, but only by counsel on his information and belief. (R. 116-118a).

The motion stated that the cause of death was Broncheal Pneumonia brough about by a suppression of the body's immunological systems caused by pressure on the brain caused by a subdural hematoma caused by multiple trauma. Further, that it was impossible to determine what trauma caused the subdural hematoma. Although the defendant admitted striking the victim, the undisputed facts did not establish that the defendant inflicted the fatal blow and therefore the State did not establish a prima facie case of guilt of second degree murder against the defendant. (R. 116-118a).

On April 5, 1984, the State filed a Traverse and/or Demurrer Subject to Additional Facts. Said Traverse, which was sworn to, specifically denied that there was no evidence which would establish which blow in particular cause the subdural hematoma. The State provided the additional facts that not only did the defendant strike the victim but that he repeatedly struck and kicked the victim in the head and that this type of multiple contusions could have caused the subdural hematoma. (R. 119-122).

On April 5, 1984, a hearing commenced on the Defendant's Sworn Motion to Reduce. (T. 6). During the hearing, the State objected to the fact that the motion was not sworn to by the defendant, but only by his counsel. (T. 14, 21). The State further objected on the grounds that during the hearing, defense counsel amended his sworn motion and which amendments were not ratified by the defendant. (T. 21). The State also objected on the grounds that Fla.R.Crim.P. 3.190 (c)(4) does not authorize a sworn motion to reduce charges. (T. 23). At the conclusion of the hearing the trial court reserved ruling. (R. 118a). Subsequent thereto, on May 15, 1984, the trial court granted the motion and reduced the charge from second degree murder to simple battery. (R. 127).

After, getting an extension of the speedy trial rule (R. 126), this appeal ensued.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S SWORN MOTION TO REDUCE CHARGES WHERE SAID MOTION WAS NOT PROPERLY SWORN TO, WHERE RULE 3.190 (C)(4) DOES NOT AUTHORIZE A SWORN MOTION TO REDUCE CHARGES AND WHERE, IF AUTHORIZED THE STATE'S TRAVERSE WAS SUFFICIENT TO REQUIRE THE TRIAL COURT TO DENY THE MOTION?

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S SWORN MOTION TO REDUCE CHARGES WHERE SAID MOTION WAS NOT PROPERLY SWORN TO, WHERE RULE 3.190(C)(4) DOES NOT AUTHORIZE A SWORN MOTION TO REDUCE CHARGES AND WHERE, IF AUTHORIZED, THE STATE'S TRAVERSE WAS SUFFICIENT TO REQUIRE THE TRIAL COURT TO DENY THE MOTION.

A motion to dismiss under Fla.R.Crim.P. 3.190 (c)(4) must specifically allege the facts on which the motion is based. The motion also must be sworn to, which contemplates that the declarant aver upon oath that the facts alleged are true. State v. Holder, 400 So.2d 162 (Fla. 3d DCA 1981). The motion to dismiss must be sworn to by one having direct knowledge of the facts asserted. State v. Bethea, 409 So.2d 1139 (Fla. 2d DCA 1982).

The motion sub judice was a narrative of facts by defense counsel and it consisted of a recitation of his depositions of the witnesses and what he believed these witnesses would say. Defense counsel then swore that the motion was true and correct to the "best of [his] knowledge and belief." (R. 116-118). This does not satisfy the requirement of a "sworn motion" as required by the rule since the rule requires that the declarant state on oath that the facts alleged are true, to his knowledge, not that he believes it to be true because someone else has told him

that it is. State v. Upton, 392 So.2d 1013 (Fla. 5th DCA 1981). Clearly, the facts set forth in the instant motion could not possibly have been within the personal knowledge of defense counsel unless he happened to have been on the scene of the alleged crime.

In State v. Upton, supra, the Court was faced with a substantially similar situation. In Upton, the motion was a narrative of facts which consisted of facts obtained from interviews with witnesses. Defense counsel then swore that the motion was true to the best of his knowledge. The Court found the motion did not satisfy the "sworn" requirement of the Rule. Since it was not sworn to by one having personal knowledge of the facts and the truth of said facts. The Court then held that the motion should have been summarily denied since it was not sworn to by the defendant.

Therefore, the State submits that the trial court erred in granting the Sworn Motion to Reduce Charges since the motion was patently defective because it was not sworn to as true by one having personal knowledge of the facts, to wit: the defendant.

Assuming arguendo that the motion was properly sworn to, then the State submits that the trial court erred in granting the motion since Fla.R.Crim.P. 3.190(c)(4) does not

authorize a Sworn Motion to Reduce Charges. Further, since the State filed a traverse which denied material facts. The trial court was required to deny the motion.

Under Rule 3.190 (c), pursuant to which the trial court acted, the only relief which may be granted is dismissal of the indictment or information. The function of a "(c)(4)" motion is to ascertain whether or not the facts which the State relies upon to constitute the crime charged, and on which it will offer evidence to prove it, do, as a matter of law, establish a prima facie case of guilt of the accused. State v. Davis, 243 So.2d 587 (Fla. 1971). Unlike the standard to be employed by a jury when it considers the evidence, on a "(c)(4)" motion all inferences are resolved against the defendant. State v. DeJerinett, 283 So.2d 126 (Fla. 2d DCA) cert. denied, 287 So.2d 689 (Fla. 1973). In considering such a motion, the trial court should not determine fact issues or consider the weight of conflicting evidence or the credibility of witnesses. State v. Fort, 380 So.2d 534 (Fla. 5th DCA 1980).

The State submits, that irrespective of the fact that State's traverse denied a material fact, the trial court erred in granting the Sworn Motion to Reduce Charges inasmuch as the trial court was without authority to reduce the charges. State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981).(Trial court acted outside its

authority by entering a judgment of not guilty pursuant to a Rule 3.190(c)(4) motion). See also, State v. Jugon, 386 So.2d 322 (Fla. 3d DCA 1980).(Trial court acted outside its authority by dismissing information on grounds that defendant entered military service, since discretion to prosecute is vested solely is State Attorney's discretion).

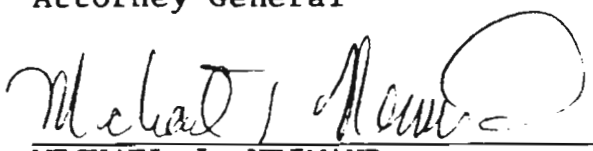
Finally, the State's traverse specifically denied a material fact, to wit: that the cause of the subdural hematoma could not be determined. Therefore, the trial court had no alternative but to deny the motion. State v. Oberholtzer, 411 So.2d 376 (Fla. 4th DCA 1982).

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the trial court's granting of the motion and reducing the charge against defendant was error requiring this Court to reinstate the original charged against the defendant.

Respectfully submitted,

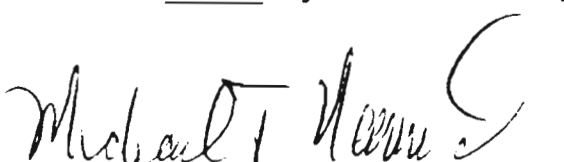
JIM SMITH
Attorney General



MICHAEL J. NEIMAND
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLANT was furnished by mail to ROBERT H. MARTIN, Attorney for Appellee, 1411 N.W. North River Drive, Miami, Florida 33125 on this 3 day of December, 1984.



MICHAEL J. NEIMAND
Assistant Attorney General

ss/

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

CASE NO. 84-1176

THE STATE OF FLORIDA,

Appellant,

v.

MARLOW K. SMULOWITZ,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

INITIAL BRIEF OF APPELLEE

Our reply brief due 4-10-85

Robert Hall Martin, Esq.
Attorney for Appellee
8362 Mills Drive
Miami, Florida 33183
(305)279-8808

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STATEMENT OF THE CASE AND FACTS

An information was filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida charging the defendant with the second degree murder of one Robert F. Patton. (R. 2-2a). The State alleged that between September 24 and 25, 1982 the defendant struck the victim, that a subdural hematoma (a swelling of the brain) was caused by this blow, and that the decedent died from broncheal pneumonia caused by the hematoma. (R. 4; Appellant's Brief, p.1).

Just prior to when the defendant is accused of beating up Robert Patton, he had already been fighting and received at lest one blow to the head. (Deposition of Janey Walker, pp. 25-28). One person with whom he fought had attacked him with a tire iron, and may have hit him in the head once with the tire iron. (Deposition of Ruth Anne Burkey, p. 31) Robert Patton had also been in a fight the night before the incident in question. (Deposition of Janie Maxine Walker, p. 5) Just a few minutes before Patton was allegedly beaten by the defendant, he was showing symptoms of developed hematoma, in that he became disoriented in familiar surroundings and appeared to be acting drunk. (p. 28; Deposition of Robert Burkey, p. 25; Deposition of B. Joseph Zumpano, pp. 13-15).

In his deposition, the Assistant Medical Examiner indicated that there is no way to state with any medical certainty which blow to the head, if any, was the cause of

the subdural hematoma, and who, if anyone is to blame for the alleged fatal blow. (Deposition of Teresa Castro-Rojas, M.D., p. 24-26.) The same was stated by Dr. Zumpano in his deposition. (Deposition of B. Joseph Zumpano, pp. 10,18,33) Further, the exact number of hours from occurrence of the injury to the formation of the hematoma cannot be determined. (Deposition of B. Joseph Zumpano, M.D., p. 10-11), (Deposition of Teresa Castro-Rojas, M.D., p. 18).

On April 4, 1984, the defendant filed, under Fla.R.Cr.P. 3.190(c)(4), a Sworn Motion to Reduce the Charge to Battery. The motion was based upon depositions, including that of the Assistant Medical Examiner and a treating physician. The basis of the motion was that the State had failed to establish a prima facie case of guilt against the defendant (R. 116-118a), since it could not be determined which blow, if any, was responsible for the development of the hematoma.

On April 5, 1984, the State filed a Traverse and/or Demurrer Subject to Additional Facts. Said Traverse denied that there was no evidence which would establish which blow in particular caused the subdural hematoma.

On May 15, 1984, the trial court granted the Defendant's Sworn Motion to Reduce and reduced the charge from second degree murder to battery. (R. 127) This appeal ensued.

QUESTION ON APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S VERIFIED MOTION TO REDUCE WHERE SAID MOTION WERE SUPPORTED BY DEPOSITIONS, WHERE RULE 3.190(C)(4) AUTHORIZES A SWORN MOTION TO REDUCE THE CHARGES, AND WHERE THE STATE'S TRAVERSE HAD NO BASIS IN MEDICAL FACT, SINCE THE MEDICAL EXPERTS AGREE THAT THE CAUSE OF THE ALLEGED FATAL INJURY CANNOT BE DETERMINED?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING THE DEFENDANT'S MOTION TO REDUCE WHERE SAID MOTION WAS SUPPORTED BY DEPOSITIONS, WHERE RULE 1.190(C)(4) AUTHORIZES A SWORN MOTION TO REDUCE THE CHARGES, AND WHERE THE STATE'S TRAVERSE HAD NO BASIS IN MEDICAL FACT, SINCE THE MEDICAL EXPERTS AGREE THAT THE CAUSE OF THE ALLEGED FATAL INJURY CANNOT BE DETERMINED.

In the case at bar, defense counsel's Motion to Reduce was verified upon the testimony of the Medical Examiner and another treating physician, as well as other witnesses. The State argues that such is not proper, alleging that the matters testified to therein must be testified to by the defendant, himself. Clearly, defense counsel's motion complies with both the letter and the spirit of Rule 3.190.

Under Fla.R.Cr.P. 3.190(c)(4), an attorney may verify a motion to dismiss where the allegations contained in the motion are supported by sworn testimony, such as a deposition. Clearly, such courtroom practice is completely "appropriate". See, State v. McIntyre, 303 So.2d 675 (Fla. 4th DCA 1974). This can clearly be seen in case law precedent.

In State v. Love, 197 So. 534 (Fla. 1940), the Supreme Court of Florida addressed whether an attorney may verify a motion to dismiss to the court under Rule 3.190. The petition at issue had not been sworn to by the defendant but was merely sworn to by counsel "to the best of his knowledge and belief." 197 So. at 535. The motion to quash did not

purport to have been signed or sworn to by the defendant. Yet is was "based upon matters in pais, of which the defendant ha[d] personal knowledge." id. The Court ruled that in such a case the motion should have been "duly sworn to by the defendant[, since] such allegations relate[d] to matters within the knowledge of the defendant and not within the knowlege of counsel (emphasis added). In short, Love held that the one who has firsthand knowledge of the facts must testify in support of a motion to dismiss.

In State v. Kling, 335 So.2d 614 (Fla. 2nd DCA 1976), the appellees' "(c)(4)" motions were verified "only by their attorneys [when] none of the facts set forth therein were within the personal knowledge of the attorneys." 335 So.2d at 615 n.1. The court, citing Love, acknowledged that a proper motion contemplates an oath by a person having firsthand knowledge of the facts. 335 So.2d at 615, n.1.

The State misstates Rule 3.190(c)(4)'s requirements when it maintains that State v. Upton supports the argument that the defendant must at all times swear to the contents of a motion to dismiss. In that case, the motion was based upon a narrative of facts by defense counsel consisting of a recitation of INTERVIEWS of witnesses and what he believed these witnesses would say. In the instant case, defense counsel based his motion upon SWORN TESTIMONY. There is a great difference between the terms "deposition", meaning sworn testimony, and "interviews", meaning statements made while not under oath. Clearly, this position comports with

established case law on point.

The State's interpretation of this rule would have the defendant swear to medical conclusions. As defense counsel stated at the hearing on the Motion to Reduce of April 5th, 1984: "all the facts [contained in the motion to dismiss] are pulled out of sworn testimony. There's no possible way the defendant can swear to this. He does not know what [any other deponent] testified [sic] of their own accord...." (R. 18).

Regarding the argument that the State's Traverse sufficiently denied that there was no evidence which would establish which blow in particular caused the decedent to develop a subdural hematoma, there is no medical basis for this allegation. The testimonies of the Medical Examiner and the treating physician indicate that whatever trauma may have caused the fatal hematoma cannot be determined with any degree of medical certainty. Cf. Alton Box. Bd. Co. v. Pantyam, 236 So.2d 452, 454 (Fla. 4 DCA 1970) (where injuries are of such character as to require skilled professional persons to determine the nature, extent and duration thereof the question is one of science and should be determined by skilled professional persons). But see, U.S. v. Mota, 598 F.2d 995 (5th Cir. 1979), cert. denied 444 U.S. 1084 (1980) (trier of fact may find expert testimony adequately rebutted by the observations of laymen).

While the State maintains that the standard for a "(c)(4)" motion is to resolve all inferences against the

defendant, it must be remembered that the presumption of the defendant's innocense operates in connection with or in aid of any proofs offered by him, or arising out of the evidence to rebut or impair a prima facie case. McNair v. State, 55 So. 401, 403 (Fla. 1911).

The State also asserts that the trial court was without authority to reduce the charges against the defendant. As the State points out in its brief, it is improper for the court to enter a judgment of not guilty on the basis of the motion to dismiss. State v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981). It is likewise outside of the authority of the trial court to dismiss an information prior to the State Attorney exercising his discretion to prosecute. However, it is proper for the court to reduce a charge on a "(c)(4)" motion, where prima facie evidence of guilt has not been established by the State. This was the basis of the defendant's Motion to Reduce and the lower court's ruling in the case at bar.

Clearly, the State has not presented prima facie evidence of guilt of the accused, bearing in mind that the cause of the Robert Patton's hematoma remains medically unknown. Defense counsel has complied letter and spirit with Rule 3.190. On this basis, the trial court's ruling should be affirmed.

CONCLUSION

Under the foregoing authorities, the defense respectfully submits that the trial court did not err in reducing the charge against the defendant. The decision of the trial court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by U.S. Mail to the Attorney General's Office, 401 Northwest 2nd Avenue, Suite 820, Miami, Florida 33128 on this the 8th day of March, 1985.

Robert H. Martin

ROBERT H. MARTIN, ESQ.

IN THE [illegible] COURT OF APPEAL
OF FLORIDA, [illegible] DISTRICT

THE STATE OF [illegible],

Appellant,

v.

MARLOW K. SMULOWITZ,

Appellee.

CASE NO: 84-1176

Attorney General

MOTION FOR REHEARING

COMES NOW the Appelle, Marlow K. Smulowitz, by and through undersigned counsel, and pursuant to Rule 9.330 Fla. R. App. P., and hereby moves this Court to Grant a Rehearing in the instant appeal and states:

1. This Court's opinion, filed on July 23, 1985 does not reach the issue of whether a trial Court's order reducing a charge in a criminal case is authorized by law.

2. This Court reasoned that the State's appeal should be dismissed, because 924.07 Florida Statutes does not authorize the State to appeal an order reducing a charge contained in an information.

3. This Court is correct in that 924.07 subsection (1) allows only an appeal from an order dismissing an indictment or information or any court thereof.

4. However, this Court may have overlooked subsection (8) of 924.07 Florida Statutes (1981) which allows the State to appeal "all other pretrial orders" provided that in any one case only one appeal under subsection (8) may be taken.

5. The language of subsection (8) seems to be intended to answer the question this Court has certified

WHEREFORE, the Appellee respectfully prays this Honorable Court to retain jurisdiction of this appeal and to grant a rehearing.

Respectfully submitted,

ROBERT H. MARTIN, ESQ.
Attorney for Appellee
8362 Mills Drive
Miami, Florida 33183
(305) 279-8808

By: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to the Office of the State Attorney, 1351 N.W. 12th Street, Miami, Florida 33125, on this the ___ day of _____, 1985.

_____

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by U.S. Mail to the Attorney General's Office, 401 N.W. 2nd Avenue, Room 820, Miami, Florida 33128 on this the ___ day of _____, 1985.

_____
ROBERT HALL MARTIN, ESQ.