IN THE SUPREME COURT OF FLORIDA

67,472

GEORGE ALLEN McGOUIRK,

Petitioner,

v. CASE NO.

STATE OF FLORIDA,

Respondent.
_____/

FILED
SID J. WHITE
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BRIEF OF RESPONDENT ON JURISDICTION

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BRIEF OF RESPONDENT ON JURISDICTION

PRELIMINARY STATEMENT

Petitioner, George Allen McGouirk, the criminal defendant and appellant in McGouirk v. State, ___So.2d___(Fla. 1st DCA May 13, 1985), 10 F.L.W. 1183, as corrected on motion for rehearing denied (Fla. 1st DCA June 18, 1985), 10 F.L.W. 1514, on motions for certification of conflict and stay of mandate denied (Fla. 1st DCA July 9, 1985) (unreported), will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, a conformed copy of the decision over which review is sought is attached to this brief (Appendix I).

No references to the record on appeal will be necessary. References to certain pleadings in this cause will be designated in appropriately descriptive terms.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's statement of the case and facts as a reasonably accurate portrayal of the legal occurrences and the evidence adduced below for purposes of resolving the threshold jurisdictional questions, subject to the following additions and/or clarifications which are documented in the State's "Motion To Dismiss" and petitioner's response thereto (Appendix II):

The First District issued its initial decision in this cause in the State's favor on May 13. Petitioner filed his one requisite motion for rehearing on May 16, see Fla.R.App.P. 9.330(b), to which the State responded on May 20. The First District denied petitioner's motion for rehearing on June 18, and also issued a corrected opinion on that date which did not bear the standard disclaimer "not final until time expires to file rehearing motion and disposition thereof if filed" which had been included on the original opinion. Thus, the First District regarded its June 18 decision as final.

On June 25, petitioner filed a "motion for certification of conflict and motion for stay of mandate" with the First District which the State opposed on June 27, arguing that such constituted in effect a prohibited second motion for rehearing, citing to Fla.R.App.P. 9.330(b) and Merchant's National Bank of Jacksonville v. Grunthal, 22 So.2d 685 (Fla. 1897). The First District denied petitioner's motions on July 9, and issued its mandate upon that date.

Petitioner did not file his Fla.R.App.P. 9.120(b) notice to invoke this Court's discretionary conflict certiorari jurisdiction with the First District until August 1 -44 days after the First District denied his properly filed Fla.R.App.P. 9.330(a) motion for rehearing - although he inaccurately represented in his notice that "rehearing" had been denied on July 9. Fla.R.App.P. 9.120(b) provides that a notice to invoke this Court's conflict certiorari jurisdiction must be filed "with the clerk of the district court of appeal within 30 days of rendition of order to be reviewed." The State thus filed its "motion to dismiss" on August 5, taking the position that petitioner's notice to invoke this Court's discretionary review was untimely under Fla.R.App.P. 9.120(b), thus requiring a dismissal of this cause for lack of jurisdiction, relying upon this Court's decision in State v. Kilpatrick, 420 So.2d 868 (Fla. 1982), cert. denied, 460 U.S. 1016 (1983). The State further took the position that petitioner could not be granted leave to file a belated petition for writ of certiorari upon any claim that his publicly-employed counsel was ineffective for failing to timely invoke this Court's discretionary jurisdiction under Wainwright v. Torna, 455 U.S. 586 (1982) and Polk County v. Dodson, 454 U.S. 312 (1981), insofar as there is no right to the assistance of counsel in discretionary proceedings, Wainwright v. Torna.

Petitioner opposed the State's motion to dismiss on August 7 by arguing that his notice to invoke was timely filed under this Court's decision in Goode v. Hialeah Race Course, Inc., 246 So.2d 105 (Fla. 1971). On August 12, this Court issued an order indicating that the question of whether its jurisdiction

was timely invoked would be considered following submission of the instant brief.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) by alleging that the decision below expressly and directly conflicts with the decision of the Second District Court of Appeal in Suarez v. State, 464 So.2d 259 (Fla. 2nd DCA 1985), review granted (Fla. 1985), Case No. 66,789.

SUMMARY OF ARGUMENT

The question of whether the decision of the First District in McGouirk v. State expressly and directly conflicts with the decision of the Second District in Suarez v. State is not presented for conflict certiorari review due to petitioner's failure to timely file his notice to invoke this Court's power of discretionary review over the former decision. Alternatively, the two decisions are not in conflict insofar as Suarez involves the propriety of multiple consecutive mandatory minimum terms of imprisonment under §775.087(2), Fla.Stat., while McGouirk involves the propriety of one mandatory minimum term imposed under this statute and another consecutively imposed under §790.161(3), Fla.Stat.

ISSUE

PETITIONER'S UNTIMELY FILING OF HIS NOTICE TO INVOKE DEPRIVES THIS COURT OF JURISDICTION TO REVIEW THE DECISION BELOW; ALTERNATIVELY, THIS DECISION IS NOT IN EXPRESS AND DIRECT CONFLICT WITH SUAREZ V. STATE, 464 So.2d 259 (Fla. 2nd DCA 1985), REVIEW GRANTED (FLA. 1985), CASE NO. 66,789.

ARGUMENT

In State v. Kilpatrick, 420 So.2d 868 (Fla. 1982), cert. denied, 460 U.S. 1016 (1983), this Court essentially held that a district court's decision shall be considered rendered, for purposes of commencing the 30 day time period within which the losing litigant must invoke this Court's discretionary jurisdiction under Fla.R.App.P. 9.120(b), when the district court denies a properly filed mandatorily reviewable Fla.R.App.P. 9.330(a) motion for rehearing, rather than when the district court issues its mandate. It thus follows that petitioner was required to file his notice to invoke this Court's jurisdiction within 30 days of the First District's June 18 denial of his motion for rehearing and simultaneous issuance of its final opinion in this cause, rather than within 30 days of its July 9 denial of his motions for certification of conflict and stay of mandate and simultaneous issuance of its mandate as he believes. Petitioner's reliance upon Goode v. Hialeah Race Course, Inc., 246 So.2d 105 (Fla. 1971) for his implicit proposition that a consistently losing district court litigant is essentially entitled to move for rehearing twice despite 9.330(b) is misplaced. In Goode, this Court merely intimated

that a party who originally prevails in a district court only to lose to his adversary upon motion for rehearing granted is entitled to pursue to a resolution his own one requisite motion for rehearing before the time period for invoking this Court's discretionary jurisdiction begins to run. Goode does not overrule 9.330(b) *sub silentio*.

Even assuming arguendo that petitioner's notice to invoke this Court's discretionary jurisdiction was timely filed, the fact is that McGouirk v. State is not in express direct conflict with Suarez v. State, 464 So.2d 259 (Fla. 2nd DCA 1985), review granted (Fla. 1985), Case No. 66,789, which explains why the First District refused to certify this purported conflict to this Court. Both Suarez and McGouirk do contain interpretations of Palmer v. State, 438 So.2d 1 (Fla. 1983), wherein this Court construed §775.087(2), Fla.Stat. and the unamended §775.021(4), Fla.Stat. to prohibit trial judges from ordering that three-year mandatory minimum terms of imprisonment based upon a defendant's possession of a firearm while committing multiple offenses in the course of a single criminal episode may be served consecutively.[1] However Suarez, like Palmer, involves

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[1] The pertinent §775.087(2) read, in relevant part:

> 775.087 Possession or use of a weapon; aggravated battery; felony reclassification; minimum sentence.--
> (2) Any person who is convicted of:
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering

(Continued on next page)

multiple consecutive mandatory minimum terms of imprisonment imposed under §775.087(2), while McGouirk in contradistinction involves one mandatory minimum term imposed under this statute

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Footnote 1 Continued

> with intent to commit a felony, or aircraft piracy or any attempt to commit the aforementioned crimes... and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provision of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.27 or s. 944.29, prior to serving such minimum sentence.

The subsequent amendment to this statute is of no relevance here.

The unamended §775.021(b) read:

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offenses excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

Effective for crimes occurring on or after June 22, 1983, §775.021(4) reads:

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

and another consecutively imposed under §790.161(3), Fla.Stat.[2] Obviously, two cases cannot be in conflict if they can be validly distinguished." Morningstar v. State, 405 So.2d 778, 783 (Fla. 4th DCA 1981), Anstead, J., concurring; affirmed, 428 So.2d 220 (Fla. 1982). See generally Thomas v. State, ___So.2d ___(Fla. 1st DCA 1985), 10 F.L.W. 1429, on motion for rehearing denied, 10 F.L.W. 1809, review granted (Fla. 1985), 10 F.L.W. 67,423.

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§790.161(3) reads, in pertinent part:

> 790.161 Making, possessing, throwing, placing, or discharging any destructive device or attempt so to do, felony; penalties.--A person who makes, possesses, throws places, discharges, or attempts to discharge any destructive device, with intent to do bodily harm to any person or with intent to do damage to property....
> (3) If the act results in bodily harm to another person or in property damage, shall be guilty of a felony of the first degree, punishable as provided in s. 775.082 or s. 775.084, and the person shall be required to serve a term of imprisonment of not less than 10 calendar years before becoming eligible for parole.

CONCLUSION

WHEREFORE, the State of Florida respectfully submits that the petition for conflict certiorari jurisdiction must be DISMISSED and/or DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent on Jurisdiction has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, on this 20th day of August, 1985.

John W. Tiedemann
Assistant Attorney General