047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,034

FILED
SID J. WHITE
MAR 12 1987
CLERK, SUPREME COURT
By ____________
Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

ARTURO J. ARRIAGADA

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

CERTIFIED QUESTION

* *

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The Petitioner, the State of Florida, was the Appellant in the District Court and the prosecution in the trial court. The Respondent, Arturo Arriagada, was the Appellee in the District Court and the defendant below. 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 trial court issued a pretrial order suppressing certain identification testimony on the basis that the procedures employed tainted the identification. (A. 1-3). The State timely filed its Notice of Appeal. (A. 4).

Thereafter Respondent filed a motion to dismiss the State's appeal. He contended that the appeal was an interlocutory one not sanctioned by Fla.R.App.P. 9.140(c)(1). Respondent futher postured that since there was no search and seizure issue present, the pretrial order supressing the identification testimony could not be considered an appealable order under Fla.R.App.P. 9.140(c)(1)(B). Finally, since it was not a search or seizure issue and appeal was not otherwise authorized, the appeal was subject to dismissal (A. 5-6).

On April 7, 1986, the Third District ordered Petitioner to show cause why the appeal should not be dismissed. (A. 7, 19).

In response to the order to show cause why the appeal should not be dismissed, Petitioner conceded that the trial

court's order suppressing the identification did not fit into any of the categories enumerated in Rule 9.140(c). However, Petitioner submitted that the appeal should be treated as a Petition for Writ of Common Law Certiorari. Petitioner reasoned that since the State's right to appeal is statutory, Petitioner had a right to appeal this order as an additional pretrial order pursuant to Section 924.07(8) Fla. Stat. (1983). Since the State had a right to appeal but no procedure via Rule 9.140(c), the procedure to be utilized was certiorari pursuant to Rule 9.030(b)(2)(a). (A. 8-12).

On June 5, 1986, the Third District granted the motion to dismiss. Judge Jorgenson dissented therefrom citing State v. Palmore, 495 So.2d 1170 (Fla. 1986). (A. 13).

The Petitioner then sought rehearing and contended that State v. Palmore, supra, implicitly recognized the theory espoused in its Response to the Order to Show Cause. Petitioner also sought certification of the issue to this Court. (A. 14-17).

On January 27, 1987, the Third District issued its opinion on rehearing and upheld its original order dismissing the appeal. In its opinion, the Third District

held this Court has chosen to implement Section 924.07 (1-8) Fla. Stat. (1983) only by way of Rule 9.140 (c). If the pretrial order is not specifically listed then, the Third District reasoned, the substance of the order is to be looked at to determine if it fits within any of the orders specifically enumerated by said rule. Finally, if the order cannot be placed within the rule then the State has no right to appeal. The Third District further opined that the instant order did not fit into Rule 9.140 (c) and therefore the State had no right to appeal. The Court then reasoned that since there was no right to appeal, relying on this Court's decision in McIntosh v. State, 496 So.2d 120 (Fla. 1986), the State had no right to common law certiorari. The Third District then acknowledged conflict with State v. Wilson, 483 So.2d 23 (Fla. 2 DCA 1985) and certified the following question:

> WHETHER THE HOLDINGS IN JONES V. STATE, [477 SO. 2D 566 (FLA. 1985)]; STATE V. G.P., [476 SO.2D 1272 (FLA. 1985)]; AND STATE V. C.C., [476 SO.2D 144 (FLA. 1985)], PRECLUDE THE STATE FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NONAPPEALABLE INTERLOCUTORY ORDERS IN CRIMINAL CASES.

(A. 18-21)

Judge Baskin dissented. She would have vacated the June 5, 1986 order and reinstated the appeal by finding that the order was one which fit within Rule 9.140(c)(1)(B). The dissent would have applied the liberal reading of identification obtained by search and seizure this court espoused in State v. Palmore, supra, and would have concluded that the State had a right to appeal the trial court's order suppressing the witness's identification. (A. 22).

The Third District stayed it's mandate. (A. 23). Petitioner then timely invoked the jurisdiction of this court and this appeal followed.

QUESTION PRESENTED

WHETHER THE HOLDINGS IN JONES V. STATE, [477 SO.2D 566 (FLA. 1985)]; STATE V. G.P., [476 SO.2D 1272 (FLA. 1985)]; AND STATE V. C.C., [476 SO.2D 144 (FLA. 1985)], PRECLUDE THE STATE FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NONAPPEALABLE INTERLOCUTORY ORDERS IN CRIMINAL CASES.

SUMMARY OF THE ARGUMENT

This case once again presents the issue of the State's right to seek certiorari review. Petitioner submits there is such a right. This is based on the fact that the section 924.07(8) Florida Statutes (1981) is the statutory authorization for said appeal. Since there is a statutory right, the procedural vehicle is certiorari. This is so because certiorari is the vehicle to review interlocutory orders which are not specifically enumerated by the rules of appellate procedure.

ARGUMENT

> WHETHER THE HOLDINGS IN JONES V. STATE, [4 SO.2D 566 (FLA. 1985)]; STATE V. G.P., [476 SO.2D 1272 (FLA. 1985)]; AND STATE V. C.C., [476 SO.2D 144 (FLA. 1985)], PRECLUDE THE STATE FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NONAPPEALABLE INTERLOCUTORY ORDERS IN CRIMINAL CASES.

At first blush, it would seem obvious that the certified question requires an affirmative answer. This is so since in each of the cases cited in the certified question, the State either by law or assumption, had no statutory right to appeal and therefore no right to common law certiorari existed. In the instant case, the State has a right to appeal and only the procedure is in doubt. Therefore the Petitioner submits that the certified question should be restated as follows:

> WHETHER THE HOLDINGS IN JONES V. STATE, 477 SO.2D 566 (FLA. 1985); STATE V. G.P., 476 SO.2D 1272 (FLA. 1985); AND STATE V. C.C., 476 SO.2D 144 (FLA. 1985), PRECLUDE THE STATE FROM SEEKING COMMON LAW CERTIORARI REVIEW OF INTERLOCUTORY ORDERS IN CRIMINAL CASES WHICH ORDERS ARE NOT SPECIFICALLY ENUMERATED IN FLORIDA RULES OF APPELLATE PROCEDURE, RULE 9.140(C).

As restated, the certified question presents the true issue involved herein and the only question left unanswered by this Court's opinions which dileneate the right of the State to appeal in criminal cases. Petitioner submits that a detailed interrelated analysis of this Court's recent opinions require that the question be answered in the negative and it be clearly stated that common law certiorari is and has always been available to the State to challenge interlocutory orders which depart from the essential requirements of law and which irremediably prejudice the State's prosecution.

State v. Creighton, 469 So.2d 735 (Fla. 1985), the first case in the formulation of the parameters of the State's right to appeal, held that said right in criminal cases depends on statutory authorization and is governed strictly by statute. The governing statutes are section 924.07 (1-8) and 924.071 (1-2) Florida Statutes (1981). Id. at 736-737.[1]

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[1]In Creighton the State sought to appeal from a final order granting a judgment of acquittal. This Court properly found no right of appeal since the order appealled from was a final one which was not specifically enumerated in sections 924.07 and 924.071 Florida Statutes (1981). Since there was no statutory authorization for an appeal this Court was not faced with, and therefore did not address, the issue of whether the State had the right to common law certiorari. If the issue would have been decided, the answer would have been no since without a statute there could not be a procedure for review. See State v. G.P., 476 So.2d 1272 (Fla. 1985).

Next, State v. C.C., 476 So.2d 144 (Fla. 1985), in accord with Creighton, held that since there was no specific statute authorizing State appeals, either plenary or interlocutory, in juvenile cases, no such appeals were viable.[2] In the companion case of State v. G.P., 476 So.2d 1272 (Fla. 1985), the question left unanswered by Creighton was addressed. This Court held that because the State did not have a right to appeal in juvenile cases the State did not have the right to review a non-statutorily authorized appeal by common law certiorari.[3]

Jones v. State, 477 So.2d 566 (Fla. 1985) continued the holding that where there is no statutory right to appeal review could not be had by common law certiorari. Although

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[2]The State now has the right to appeal in juvenile cases. See sections 39.14(1)(b)(1-8) and 39.145(1-2) Florida Statutes (1986 Supp). These statutes are identical to those that give the State the right to appeal in criminal cases. See sections 924.07(1-8) and 924.071(1-2) Florida Statutes 1981).

[3]In light of this Court's holding in Creighton, the decision in R.J.B. v. State, 408 So.2d 1048 (Fla. 1982) requires modification inasmuch as it is the legislatures function to authorize state appeals and it is only this Court's function to provide a procedural vehicle for the appeal. Therefore R.J.B.'s holding that the legislature cannot create a right to review interlocutory orders is an direct conflict with Creighton and recession therefrom is required.

reaffirming G.P., the question of whether there was no appeal available to the State was not before this Court and therefore not decided. The effect of this admission by this Court is to place Jones in the same posture as Creighton, and that is when there is no statutory right to appeal review is totally prohibited.

Finally, McIntosh v. State, 496 So.2d 120 (Fla. 1986), the decision the Third District relied upon to refuse to grant certiorari jurisdiction, suffers the same infirmity as Jones. Once again G.P. was reaffirmed, and once again the question of whether the appeal from the pretrial order in question was statutorily authorized was not before this Court and therefore not determined.

Based on the foregoing analysis, the State's right to appeal is governed by statute. When there is no statutory authorization there is absolutely no right to review. The question remains concerning those orders where there is statutory authorization for a State appeal but no procedure has been provided therefore.

Section 924.07(8) Florida Statutes (1981) provides that the State may appeal from all other pretrial orders, except that it may not take more than one appeal under this

subsection in any case.[4] Since this is the necessary statutory right to allow the State to appeal interlocutory orders, the procedure to effectuate said right must be determined. Article V, section 4(b)(1) Florida Constitution provides that district courts may review interlocutory orders to the extent provided by rules adopted by this Court. This Court has enacted Rules 9.030(b)(1)(B) & (2)(A), 9.130, and 9.140 Fla.R.App. P. as the rules to effectuate interlocutory review. When these provisions are read in pari materia, the outcome is that the State has the right to review pretrial orders pursuant to common law certiorari.

Rule 9.030(b) delineates the scope of the district courts jurisdiction. Pursuant to (b)(1)(B) of said rule, review of non final orders of circuit courts are governed by Rule 9.130. Pursuant to (b)(2)(a) of rule 9.030, the district courts may exercise its certiorari jurisdiction to review all non final orders of lower tribunals other than those prescribed by Rule 9.130. Rule 9.130 deals with

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[4]In State v. Smith, 260 So.2d 489 (Fla. 1982) this Court held section 924.07(8) to be unconstitutional and void since the Florida Constitution does not authorize the legislature to provide for interlocutory review. However, this Court in Creighton implicitly receded from Smith by holding that the States right to appeal is governed by statute and only the procedure to effectuate said legistive right is controlled by this Court.

the nature, scope and procedure to review non final orders. In accordance with (a)(2) of said rule, review of non final orders in criminal cases shall be as prescribed by Rule 9.140. Rule 9.140(c)(1)(A-J) then specifically lists orders which the State may appeal. Those pretrial orders which are not specifically listed therein, then are those comtemplated by Rule 9.030(b)(2)(a) and subject to certiorari jurisdiction of the district courts.

Based on the foregoing analysis, when the statutory right for the State to appeal is grounded in section 924.07(8) Florida Statute (1981), common law certiorari is the rule of procedure that this Court has enacted to effectuate the right established by said section. There cannot be any other result since the State as a litigant is constitutionally entitled to a fair trial, Singer v. United States, 380 US 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965) and that to deprive the State from seeking review of pretrial orders that depart from the essential requirements of law and irremediably prejudices the prosecution of the case, inappropriately establishes the trial courts as the

supreme authority on constitutional issues.[5] State v. White, 470 So.2d 1377, 1378, N.1. (Fla. 1985).

If this Court wishes to avoid the broader issue raised herein, Petitioner submits that relief is available on the narrower issue of whether there is a right to appeal the order in question. On the interests of brevity, Petitioner adopts Judge Baskin's disenting opinion which finds that the order appealed from pretains to evidence obtained by search and seizure and is appealable pursuant to Rule 9.140(c)(1)(b) Fla.R.App.P. State v. Palmore, 495 So.2d 1170 (Fla. 1986).

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[5]The fear that recognition of the States right to certiorari would open a flood gate of litigation is unfounded. Certiorari jurisdiction is strictly limited to pretrial orders which are departures from the essential requirement of law to the irremediable prejudice of the State to prosecute its case. Only if this limitation is met, is a case subject to certiorari review. State v. Hohl, 431 So.2d 707, 709 N.1. (Fla. 2 DCA 1183). State v. Steinbrecker, 409 So.2d 570 (Fla. 2 DCA 1982) State v. Williams, 442 So.2d 240 (Fla. 5 DCA 1983).

CONCLUSION

Based upon the points and authorities contained herein, the State respectfully requests that this Court answer the certified question in the negative, quash the decision of the third district and reinstate the instant appeal.

Respectfully submitted,

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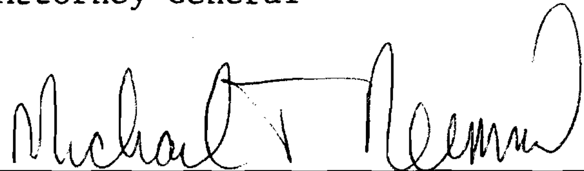

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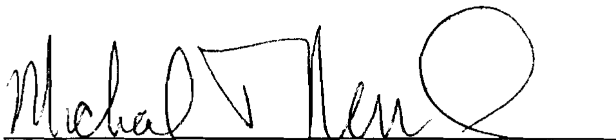
CERTIFICATE OF SERVICE

I HEREBY CERTITY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON THE MERITS was furnished by mail to KAREN M. GOTTLIEB, Attorney for Respondent, 1351 N.W. 12th Street, Miami, Florida 33125, on this 10th day of March, 1987.



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