IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,034

THE STATE OF FLORIDA,

Petitioner,

vs.

ARTURO J. ARRIAGADA,

Respondent.

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTION

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Petitioner, the State of Florida, was the appellant in the District Court of Appeal of Florida, Third District, and the prosecution in the trial court. Respondent, Arturo J. Arriagada, was the appellee in the district court and the defendant in the trial court. In this brief, the parties will be referred to as they stand before this Court. The symbol "R." will be used to designate the record on appeal as transmitted by the district court, and the symbol "A" will be used to designate documents contained in the appendix to petitioner's brief where the documents are not included in the transmitted record. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as set forth in the Brief of Petitioner.

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 ARGUMENT

Under the state constitution, the right of the state to obtain interlocutory review is strictly delimited by the rules of this Court. Where, as here, an interlocutory order of the trial court in a criminal case is not subject to appeal by the state pursuant to Rule 9.140(c), Fla.R.App.P., the state cannot circumvent that rule by obtaining review by common law certiorari.

ARGUMENT

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.

The question certified by the district court has been answered in the affirmative by the unanimous holding of this Court in McIntosh v. State, 486 So.2d 120 (Fla. 1986). In McIntosh, this Court expressly resolved that where "the state had

no right to directly appeal the pretrial order, [the district court] was without authority to afford review by way of certiorari." Id. at 120-21 (footnote omitted).[1]

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[1] In McIntosh, the district court's determination that the state had no right to appeal the pretrial order at issue was not before this Court. Id. at 121 n.1. The same is equally true in this case in light of the question certified by the district court:

> 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.

(R. 88).

It should additionally be noted that the state conceded before the district court, in requesting that its appeal be treated as a petition for common law certiorari, that the interlocutory appeal was not authorized by Rule 9.140(c) of the Florida Rules of Appellate Procedure. (A. 8). The district court thus correctly concluded that this Court's decision in McIntosh was controlling:

> In response to this court's order to show cause why the appeal should not be dismissed, the State of Florida concedes that the trial court's order suppressing the identification does not fall into any of the categories enumerated in Florida Rule of Appellate Procedure 9.140(c) and urges this court to treat the moving papers as a petition for certiorari, as was done in Smith [260 So.2d 489 (Fla. 1972)]. We must decline to grant the relief requested upon the recent authority of McIntosh v. State, 496 So.2d 120 (Fla. 1986). In McIntosh, the trial court ruled that a minor witness was incompetent to testify against the defendant, and suppressed the witness's testimony. On the authority of C.C., G.P., and Jones, the supreme court held that the district court could not review the pretrial order by way of certiorari if the state had no right of direct appeal. Like the present case, McIntosh did not suppress evidence obtained by search and seizure.

(R. 88-89)(original emphasis).

The McIntosh decision is eminently sound. "[A]rticle V, section 4(b)(1) of the state constitution permits interlocutory review only in cases in which an appeal may be taken as a matter of right." State v. C.C., 476 So.2d 144, 146 (Fla. 1985). An appeal may be taken by the state from interlocutory orders as a matter of right only where authorized by Supreme Court rule. See R.J.B. v. State, 408 So.2d 1048 (Fla. 1982); State v. Smith, 260 So.2d 489 (Fla. 1972). Thus, it follows that where this Court has chosen not to grant the right of appeal of the pretrial order in question in the governing rule of appellate procedure, Fla.R.App.P. 9.140(c), the state cannot circumvent the delimited provisos of that rule by invoking the nomenclature "certiorari"; "[t]he state has no greater right by certiorari", State v. G.P., 476 So.2d 1272, 1273 (Fla. 1985), for "no right of review by certiorari exists if no right of appeal exists." Jones v. State, 477 So.2d 566 (Fla. 1985)(citation omitted); accord, State v. Jones, 488 So.2d 527, 528 (Fla. 1986); R.L.B. v. State, 486 So.2d 588, 589 (Fla. 1986); see D.A.E. v. State, 478 So.2d 815 (Fla. 1985). See also State v. C.C., 449 So.2d 280, 281-82 (Fla. 3d DCA 1983) (Schwartz, C.J., concurring)(district court has "no authority to and should not permit review [by certiorari] in an instance in which the Supreme Court has deliberately declined to do so", citing State ex rel. Alton v. Conkling, 421 So.2d 1108, 1112-13 (Fla. 5th DCA 1982)(Cowart, J., dissenting)), adhered to on rehearing en banc, 449 So.2d 282, approved, 476 So.2d 144 (Fla. 1985).

The state nonetheless seeks to avoid this Court's consistent and unequivocal resolution of the certified question, by weaving an argument necessarily dependent upon an erroneously overbroad reading of State v. Creighton, 469 So.2d 735 (Fla. 1985). The state argues that, under Creighton, the state's right to appeal is governed solely by "statute". (Brief of Petitioner at 9). From this generalized proposition, the state posits that "it is the legislature's function to authorize appeals and it is only this Court's function to provide a procedural vehicle for the appeal." (Brief of Petitioner at 10 n.3). Since a state appeal in criminal cases of all pretrial orders is putatively authorized by Section 924.07(8), Florida Statutes, the state claims its right to appeal is guaranteed in this case by statute, and is to be perfected by the procedural vehicle of certiorari. (Brief of Petitioner at 11-13).

Returning to the cornerstone of the argument, State v. Creighton, it is at once apparent that the state's analysis is predicated upon a gross misconception of the Creighton holding. In Creighton, the state had sought to appeal a final order granting judgment of acquittal. The state predicated its appellate review on "a right to an appeal conferred not by statute, but by the Constitution of Florida." 469 So.2d at 737. This Court, however, rejected the state's assertion of a constitutional right of appeal, explicitly holding that the state constitution did not confer "a right on any litigant to appeal any adverse final judgment or order." Id. at 740 (footnote omitted). Instead, the state's right to appeal was held to be

governed strictly by statute, and the lodged appeal, which was not cognizable under Florida Statutes, was ruled unauthorized.

From this entirely appropriate announcement in the context of appeals of final orders, the state now attempts to extricate a controlling rule for interlocutory appeals. Yet, the state's assertion that its right of interlocutory appeal is conferred by statute has been twice explicitly rejected by this Court. First, in State v. Smith, 260 So.2d 489 (Fla. 1972), the Court held unconstitutional Section 924.07(8), Florida Statutes, which purports to grant to the state the right to appeal all pretrial orders:

> The Constitution does not authorize 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 . . . , the purported enactment is void.

Id. at 491.[2]

2

It is significant that the issue whether common law certiorari would lie to review the state's unauthorized interlocutory appeal was not expressly resolved by the Smith Court. The cause was on direct appeal to this Court because the district court of appeal had held the state statute authorizing the interlocutory appeal to be unconstitutional. The district court, after holding that the interlocutory appeal could not lie, had treated the appeal as a petition for writ of common law certiorari and found no departure from the essential requirements of the law. This Court, after adopting the district court's analysis of the constitutional question, disagreed on the merits that no departure from the requirements of law has been demonstrated and quashed the district court decision in this regard, without analyzing whether review by certiorari exists where the right of appeal does not. This question has, of course, now been repeatedly and unequivocally resolved by this Court. E.g., McIntosh v. State, 496 So.2d at 120-21; Jones v. State, 477 So.2d at 566; State v. G.P., 476 So.2d at 1273.

Ten years later, this Court reaffirmed the holding in Smith, that the right of interlocutory appeal is not conferred by statute, in the decision in R.J.B. v. State, 408 So.2d 1048 (Fla. 1982):

> Even if the legislature had intended to create a right of interlocutory appeal from waiver orders, such enactment would have been void because the Florida Constitution does not authorize the legislature to provide for interlocutory review. State v. Smith, 260 So.2d 489 (Fla. 1972).
>
> This Court is vested by the constitution with the sole authority of deciding when appeals may be taken from interlocutory orders. Article V, section 4(b)(1) expressly provides that district courts of appeal "may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court." This Court has not adopted any appellate rule which permits the type of interlocutory appeal sought by petitioners.

Id. at 1050. It is thus plain that the state's thesis that all state appeals are governed exclusively by statute is wrong. Absent constitutional revision, the state's right to appeal final orders is conferred by statute, and its right to appeal interlocutory orders is conferred by rules of this Court.[3]

3

That the Creighton holding recognizing the state's "statutory" right to appeal has not overruled State v. Smith and R.J.B. v. State, as petitioner argues at page 10 n.3 and page 12 n.4 of its brief, is evidenced by cases subsequent to Creighton, in which this Court notably has not spoken solely of the state's statutory right to appeal, but has recognized an alternative "cognizable right to appeal". State v. Palmore, 495 So.2d 1170 (Fla. 1986); McIntosh v. State, 496 So.2d at 121; Jones v. State, 477 So.2d at 566.

Indeed, Palmore makes clear that the usage of the phrase "statutory right to appeal" is generic, and not intended to mean that the state's right of interlocutory appeal is conferred by (Cont'd)

The state's final retreat, that the interlocutory appeal of the trial court order should be deemed authorized by Rule 9.140(c)(1)(B), Fla.R.App.P., granting the right to appeal an order "[s]uppressing before trial confessions, admissions or evidence obtained by search and seizure", (Brief of Petitioner at 14), is equally unavailing. First, that issue is not before the Court. See n.1, supra. Second, the order of the trial court does not fall within 9.140(c)(1)(B), no matter how liberally that rule is construed.

The trial court, while denying the defendant's motion to suppress identification of the defendant by the alleged victim, entered an order granting the motion to suppress the identification by a police officer on the grounds of suggestivity of the identification procedures and the unreliability of the identification. (R. 72-74).[4] Since at issue was the suppression of evidence, and not the suppression of a confession or admission, it is established that the requirement that the evidence be "obtained by search and seizure" applies. State v. Palmore, 495 So.2d at 1170-71; McPhadder v. State, 475 So.2d 1215

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statute and not appellate rule. Thus, in Palmore, the Court held "that the state has a statutory right to appeal in a case such as this", id. at 1171, involving the appeal of an interlocutory order, citing not to the statute authorizing state appeals, but to Article V, Section 4(b)(1) of the state constitution and Rule 9.140(c)(1)(B) of the Florida Rules of Appellate Procedure.

4

It is apparent that any assertion of "irremediable prejudice of the state to prosecute its case", see Brief of Petitioner at 14 n.5, would be unfounded here. Moreover, as pointed out by the respondent in the motion to dismiss filed in the district court, the state could not establish even a prima facie showing of a departure from the essential requirements of the law. (See A. 5-6).

(Fla. 1985). See also State v. Jones, 488 So.2d at 528 ("We decline the state's invitation to recede . . . from our adherence to the general principle that statutes which afford the government the right to appeal in criminal cases should be construed narrowly")(citation omitted). It is further manifest that the evidence ordered suppressed was in no way "obtained by search and seizure", as recognized by the majority decision below (R. 88), and conceded by the state in its response to the order to show cause why the appeal should not be dismissed. (A. 8).

Petitioner's final public policy argument that a non-restrictive scope of interlocutory appeal by the state is essential (Brief of Petitioner at 13-14), misses the mark. Not only is this contention wholly inconsistent with "the common-law rule", as recognized by this Court in State v. Creighton, 469 So.2d at 740, but most significantly, it is completely irrelevant to the jurisdictional question before the Court. As was cogently explicated by this Court in R.J.B. v. State, 408 So.2d at 1050:

> We need not discuss the merits of permitting such interlocutory appeals which are alluded to . . . or the merits of not permitting such interlocutory appeals. It is sufficient to say that this Court has not adopted a rule allowing interlocutory appeal . . . .

The same is true in the present case, and the question certified by the district court must be answered in the affirmative.

CONCLUSION

Based upon the foregoing, respondent respectfully requests that this Court answer the certified question in the affirmative and approve the decision of the District Court of Appeal of Florida, Third District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was forwarded by mail to MICHAEL J. NEIMAND, Assistant Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128 this 31st day of March, 1987.

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