IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,468

THE STATE OF FLORIDA,

Petitioner,

vs.

TERRY CECIL,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTION

* *

BRIEF OF PETITIONER ON MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

INTRODUCTION

The Petitioner, the State of Florida, was the Appellant in the District Court and the prosecution in the trial court. The Respondent, Terry Cecil, 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 Petitioner appealed from a pretrial order precluding the testimony of a potential witness for the prosecution because of a discovery sanction. (A. 1). The Respondent moved to dismiss contending that the appeal was not statutorly authorized and review was prohibited. (A. 3) In response thereto, Petitioner submitted that their is a right to appeal based on section 924.07(8) Florida Statutes (1981). Since there is statutory authorization for said appeal, all that was lacking was a procedural vehicle and that vehicle was common law certiorari. (A. 4-7). The Third District granted the motion to dismiss finding that the order was not reviewable either by appeal or by certiorari. The Third District certified the following question.

> Whether the state is precluded from seeking common law certiorari review of non-appealable interlocutory orders in criminal cases.
>
> (A. 2)

Petitioner then filed a Notice to Invoke this Court discretionary jurisdiction and a motion to Stay Mandate was filed with the Third District.

QUESTION PRESENTED

WHETHER THE STATE IS PRECLUDED FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NON-APPEALABLE 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. This court's recent holding in Ramos v. State, 12 F.L.W. 173 (Fla. April 9, 1987) establishes that the substantive right of appeal created by section 924.07(8) creates a state right to appeal interlocutory orders and as such this Court must provide, at present time, certiorari as the procedure for said right.

ARGUMENT

WHETHER THE STATE IS PRECLUDED FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NON-APPEALABLE INTERLOCUTORY ORDERS IN CRIMINAL CASES.

Initially, it would seem obvious that the certified question requires an affirmative answer. This is so since the state's right to appeal is governed by statute and without statutory authorization, the State cannot seek any type of review. State v. Creighton, 469 So.2d 735 (Fla. 1985). In the instant case the State has a right to appeal and therefore this Court must establish a procedure to implement that right. Ramos v. State, 12 F.L.W. 173 (Fla. April 9, 1987). Therefore Petitioner submits that the certified question should be restated as follows:

WHETHER THE STATE IS PRECLUDED FROM SEEKING COMMON LAW CERTIORARI REVIEW OF INTERTOCUTORY 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 previously left unanswered by this Court's opinions which dileneate the right of the State to appeal in criminal cases. See Ramos v. State, supra. Petitioner submits that a detailed inter-

related 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, supra 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]

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]

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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 reveiw. See State v. G.P., 476 So.2d 1272 (Fla. 1985).

[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).

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 hyave 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 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 the 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.

McIntosh v. State , 496 So.2d 120 (Fla. 1986), suffers the same infirmity as Jones. Once again G.P. was reaffirmed, and once again the question of whether the appeal from the

[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. Accord Ramos v. State, supra.

pretrial order in question was statutorily authorized was not before this court and therefore not determined.

Then in Ramos v. State, supra, this Court reaffirmed that the State has only those rights of appeal as are expressly conferred by statute. This Court then held:

> . . . Substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court. State v. Furen, 118 So.2d 6 (Fla. 1960).
>
> 12 F.L.W. at 174.

Based on the foregoing principles of law the State, pursuant to section 924.07(8) Florida Statutes (1981) has a statutory right to appeal pretrial orders. Since there is such a right this Court must provide for a procedure to implement this right and since there is no specific rule of procedure, the rule of procedure governing state appeal's of pretrial orders is common law certiorari.

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 the nature, scope and procedure to review non final orders In accordance with (a)(2) of said rule, review of non final

[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 implicityly receded from Smith by holding that the State right to appeal is governed by statute and only the procedure to effectuate said legistuive right is controlled by this Court. Accord Ramos v. State, supra.

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 contemplated 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 U.S. 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).

[5] The fear that recognition of the Staes 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. 2d DCA 1983); State v. Steinbrecker, 409 So.2d 570 (Fla. 2d DCA 1982); State v. Williams, 442 So.2d 240 (Fla. 5th DCA 1983).

If this court wishes to avoid the broader issue raised herein, the State submits that the specific order appealed from is one whose effect is that of dismissal since without the victims testimony the State cannot prosecute. In reality the substance of the order is dismissal and therefore the State has a right to appeal pursuant to Fla.R.App.P. 9.140 (C)(1)(A). State v. Handerson, 482 So.2d 1380 (Fla. 3d DCA 1986).