IN THE SUPREME COURT OF FLORIDA

CASE NO.

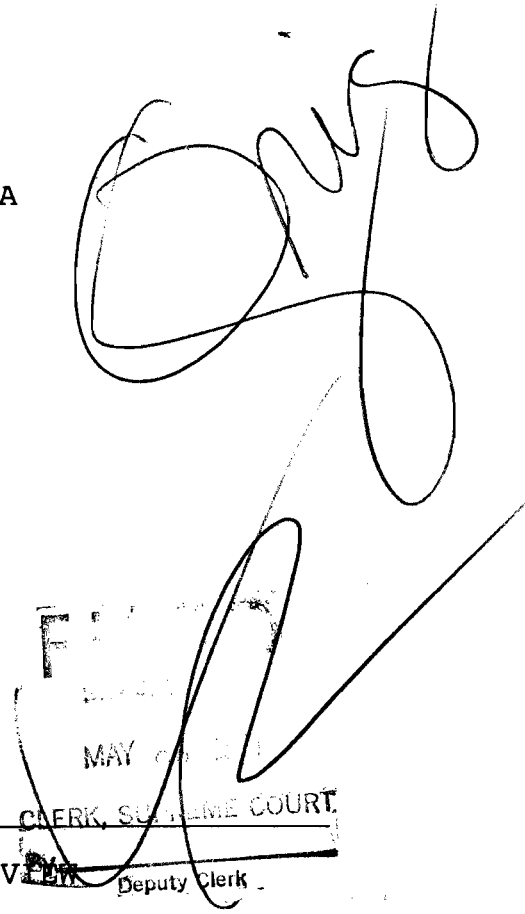
THE STATE OF FLORIDA,

Petitioner,

vs.

TERRY CECIL,

Respondent.



ON PETITION FROM DISCRETIONARY REVIEW
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, Terry Cecil, 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. 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 petitioner's brief.

QUESTION CERTIFIED

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

SUMMARY OF THE ARGUMENT

Under the state constitution, the right of the state to obtain interlocutory review is strictly limited 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 STATE IS PRECLUDED FROM SEEKING COMMON LAW CERTIORARI REVIEW OF NON-APPEALABLE INTERLOCUTORY ORDERS IN CRIMINAL CASES.

The question certified by the district court has already been answered in the affirmative by this Court in McIntosh v. State, 486 So.2d 120 (Fla. 1986), where this Court ruled that where "the state had no right to directly appeal the pretrial order, [the district court] is without authority to afford review by way of certiorari." This Court sent on to say:

> "In C. C., 476 So. 2d at 146, we held that the state is entitled to interlocutory review only in those cases where an appeal may be taken as a matter of right. In State v. G. P., 476 So.2d 1272 (Fla. 1985), we held that no right of review by certiorari exists in the absence of a right of appeal. See also Jones, 477 So.2d at 566 (appellate court cannot afford review to the state by way of certiorari when the state has no statutory or other cognizable right to appeal the judgment sought to be reviewed)."

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 limited provisos of that rule by using the nomenclature "certiorari."

The State's reliance on State v. Creighton, 469 So.2d 735 (Fla. 1985) is based on a gross misconception of the holding in that case. In Creighton, the state had sought to appeal a final order granting a 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 argument, expressly holding that the state constitution did not confer "a right on any litigant to appeal any adverse final judgment on order." Id. at 740. Instead, the state's right of appeal was held to be governed strictly by statute and the state's appeal was ruled unauthorized.

The state's assertion that its right of interlocutory appeal is conferred by statute has been twice expressly rejected by this Court in State v. Smith 260 So.2d 489 (Fla. 1972) and R.J.B. v. State, 408 So.2d 1048 (Fla. 1982). It is clear, therefore, that the state's argument that all state appeals are governed exclusively by statue 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.

Finally, the state contends that it has a right to an interlocutory appeal because the order of the trial court was equivalent to an order of dismissal. This contention is not meritorious for two reasons. First, that issue is not before this Court. Second, the order of the trial court is an order suppressing the testimony of a witness and, therefore, is clearly not appealable. McIntosh, supra, and see State v. Arriagada, 12 F.L.W. 369 (Fla. 3d DCA Jan. 27, 1987). Like both those cases, the trial court's order here did not suppress evidence obtained by search and seizure.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 19th day of May, 1987.

N. Joseph Durant, Jr.

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