IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED
SID J. WHITE
AUG 1989
CLERK, SUPREME COURT
By Deputy Clerk

CASE NO.: 72,759

VERONICA STIEGLITZ,

Petitioner

vs.

CITY COMMISSION, CITY OF SOUTH MIAMI,

Respondent.

INITIAL BRIEF OF PETITIONER ON PETITION FOR REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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INTRODUCTION

This case has been certified to the court as a decision involving a question of great public interest. The question posed is a procedural one, asking:

> When a party seeks appellate review of a non-appealable order, and assuming that the notice of appeal is timely filed in the lower tribunal, must a notice of appeal be filed in the Appellate Court within 30 days of rendition of the order in order for the Appellate Court to have jurisdiction to treat the notice as a petition for writ of certiorari?

The parties will be referred to by name, and a few references to the record on appeal prepared by the Clerk of the Third District Court of Appeal will be identified as "R. ___".

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review of a final judgment in favor of Respondent, rendered by the Appellate Division of the Dade County Circuit Court, Case No. 86-135-AP. Petitioner timely filed a notice of appeal with the clerk of the Eleventh Judicial Circuit "R. 1-75". Respondent filed three Motions to Dismiss in the District Court, Third District, arguing that pursuant to Florida Rules of Appellate Procedure 9.030(b)(2)(B) and 9.100, the District Court could review final orders of the Circuit Court Appellate Division only if the District Court's certiorari jurisdiction was invoked. After denying Respondent's Amended Motion to Dismiss, the District Court granted Respondent's Renewed Motion to Dismiss but certified the question to this Court in its Opinion filed April 5, 1988. (R.100).

ISSUE PRESENTED ON CERTIFIED QUESTION

The Third District Court of Appeals certified the following question to be one of great public importance:

> WHEN A PARTY SEEKS APPELLATE REVIEW OF A NON-APPEALABLE ORDER, AND ASSUMING THAT THE NOTICE OF APPEAL IS TIMELY FILED IN THE LOWER TRIBUNAL, MUST THE NOTICE OF APPEAL BE FILED IN THE APPELLATE COURT WITHIN 30 DAYS OF RENDITION OF THE ORDER IN ORDER FOR THE APPELLATE COURT TO HAVE JURISDICTION TO TREAT THE NOTICE AS A PETITION FOR WRIT OF CERTIORARI?

SUMMARY OF THE ARGUMENT

Until this year, all district courts have recognized that if a party timely invoked the jurisdiction of the Appellate Court by seeking an improper remedy, the court has jurisdiction and should review the case. The legislature and the courts have until now held that a party should not be denied review solely because the party sought an improper remedy. In this case, Petitioner has invoked the jurisdiction of the Appellate Court within the time prescribed by the rules. Petitioner's notice of appeal was filed within 30 days of the rendition of the lower tribunal's order, as required by Florida Rule of Appellate Procedure 9.110(b). Thus, the Order Granting Respondent's Motion to Dismiss ignores the clearly articulated legislative and judicial intent that review not be denied to a party who has sought an improper remedy and the question certified should be answered in the negative.

ARGUMENT

WHEN A PARTY IMPROPERLY SEEKS APPELLATE REVIEW BY APPEAL, AN APPELLATE COURT MUST TREAT A TIMELY NOTICE OF APPEAL AS A PETITION FOR WRIT OF CERTIORARI REGARDLESS OF WHETHER THE LOWER TRIBUNAL TRANSFERS THE NOTICE OF APPEAL TO THE APPELLATE COURT WITHIN 30 DAYS OF RENDITION OF THE ORDER.

The District Court granted Respondent's renewed Motion to Dismiss on the authority of Gelinas v. City of South Miami, 13 F.L.W. 747 (Fla. 3d DCA, April 1, 1988), Paul v. City of Miami Beach, 519 So.2d 1150 (Fla. 3d DCA 1988) and the First District Court of Appeal's decision in Johnson v. Citizens State Bank, 518 So.2d 410 (Fla. 1st DCA 1988). The Gelinas and Paul decisions relied upon Johnson, which Petitioner contends is incorrectly decided, contrary to the decision in City of Miami Beach v. Eason, 194 So.2d 652 (Fla. 3d DCA 1967) and, most importantly, contrary to Article V, Section 2(a) of the Florida Constitution, Florida Statute §§59.45, 59.081, as well as Florida Rule of Appellate Procedure 9.040(c).

The decisions in Gelinas, Paul and Johnson are incorrect as they ignore established law. Florida's Legislature and the Florida Supreme Court established a clear rule that a party should not be denied a review by this Court solely because an improper remedy was sought. Article V, Section 2(a) of the Florida Constitution states in relevant part that:

> The supreme court shall adopt rules for the practice and procedure in all courts including . . . . the transfer to the court having jurisdiction of any proceeding when the

> jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Pursuant to this mandate, the Florida Supreme Court has enacted Florida Rule of Appellate Procedure 9.040(c), which states:

> If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the Court to seek the proper remedy.

The Advisory Committee Note to Florida Rule of Appellate Procedure 9.040(c) states:

> Sections (b) and (c) implement Article V, Section 2(a) of the Florida Constitution ... Under these provisions a party will not automatically have his case dismissed because he seeks an improper remedy or invokes the jurisdiction of the wrong court. The court must instead treat the case as if the proper remedy had been sought and transfer it to the court having jurisdiction. All filings in the case have the same legal effect as though originally filed in the court to which transfer is made. (Emphasis added).

Florida Statute §59.45 states:

> If an appeal be improvidently taken where the remedy might have been more properly sought by certiorari, this alone shall not be ground for dismissal....

The District Court of Appeal, Third District, has recognized that the constitutional provision, rule and statute referred to above allow a timely notice of appeal to be treated as a timely petition for writ of certiorari when a party seeks review of a circuit court appellate decision. In City of Miami Beach v. Eason, 194 So.2d 652 (Fla. 3d DCA 1967), the Third District

referred to the above statute in a situation similar to the instant case:

> At the outset we note that this appeal is from a decision rendered by the circuit court in exercise of its appellate jurisdiction. Provision is not made for appeal of such a decision to this court. However, it is provided in §59.45 Fla. Stat., F.S.A. that where an appeal is improvidently taken when the remedy might have been more properly sought by certiorari, the notice of appeal and the record thereon may be regarded and acted on as a petition for certiorari duly presented. Accordingly, we take jurisdiction and treat the appeal as a certiorari.

Id. at 653. Further, in Save Brickell Avenue, Inc. v. City of Miami, 393 So.2d 1197, 1198 (Fla. 3d DCA 1981), the Third District stated:

> We have treated the appeal filed in this court as a petition for certiorari because the proceeding in the circuit court was itself an appeal.

Id. at 1198 n.1. In Lacalle v. State, 479 So.2d 814 (Fla. 3d DCA 1985), the Third District said:

> The proper method for seeking review of a circuit court appellate decision is by petition for writ of certiorari. Fla.R.App.P. 9.030(b)(2)(B). We therefore treat this appeal as an application for writ of certiorari, Fla.R.App.P. 9.040(c)....

Id. at 814.

Other District Courts have also treated appeals as petitions for writs of certiorari.[1] In a situation similar to the instant case, the Fourth District Court of Appeal, relying upon Eason, supra, stated:

> As noted this appeal is from a decision rendered by the circuit court in the exercise of its appellate jurisdiction. There is no provision for the appeal of such a decision to this Court. However, F.S. §59.45, F.S.A., provides where an appeal is improvidently taken, when the remedy might have been more properly sought by certiorari, a notice of appeal and the record thereon may be regarded and acted on as a properly presented petition for certiorari. See City of Miami Beach v. Eason, Fla.App. 1967, 194 So.2d 652.

City of Fort Lauderdale v. Couts, 239 So.2d 874, 875 (Fla. 4th DCA 1970) (emphasis added).

Arguably, one justification for the constitutional provision, rule, statute and decisions referred to above is the ambiguous nature of Florida Rules of Appellate Procedure 9.030(b)(1)(A) and 9.030(b)(2)(A), as well as the confusion District Courts have created by the interchangeable use of "certiorari" and "appeal":

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1 State v. Mitchell, 445 So.2d 405 (Fla. 5th DCA 1984); Hackenberg v. Artesian Pools of East Florida, Inc., 440 So.2d 475 (Fla. 5th DCA 1983); Stansberry v. City of Lake Helen, 425 So.2d 1157 (Fla. 5th DCA 1982); City of Deerfield Beach v. Vailiant, 399 So.2d 1045 (Fla. 4th DCA 1981), aff'd, 419 So.2d 624 (Fla. 1982). Further, even Johnson v. Citizens Bank, 518 So.2d 410, 411 (Fla. 1st DCA 1988), relied upon by Respondent and this Court, recognized an appeal can be treated as a Petition for a Writ of Certiorari.

> The controversy is complicated by the sometimes interchangeable use of the words "certiorari" and "appeal" with the intention, in generic terms, of denoting a seeking out of higher appellate review.... In this respect we must ourselves confess generic use of the term "appeal", for in our first rendering of Campbell v. Vetter, supra, we called the review to our court an "appeal" though we there correctly defined it as if it were a petition for certiorari which it really was.

City of Deerfield Beach v. Vailiant, 399 So.2d 1045, 1046-1047 (Fla. 4th DCA 1981), aff'd, 419 So.2d 624 (Fla. 1982). Indeed, in zoning cases relied upon by Petitioner, the District Court of Appeal, Third District reviewed by appeal situations similar to this case. In Dade County v. Florida Mining and Materials Corp., 364 So.2d 31 (Fla. 3d DCA 1978), an "appeal" was taken from a decision on writ of certiorari in the circuit court. Likewise, in Kugel v. City of Miami Beach, 206 So.2d 282 (Fla. 3d DCA 1968), the District Court of Appeal, Third District reviewed by "appeal" a zoning decision which had been rendered by a commission and reviewed by certiorari in the Circuit Court.

In accordance with the decisions, statute, rule, and constitutional provision referred to above, the District Court of Appeal, Third District properly denied Respondent's Amended Motion to Dismiss. However, after the First District Court of Appeal's decision in Johnson v. Citizens State Bank, 518 So.2d 410 (Fla. 1st DCA 1988), Respondent, relying upon Johnson, renewed its Motion to Dismiss. Although Johnson recognized that an appeal can be treated as a petition for a writ of certiorari,

the Johnson Court questioned whether it had jurisdiction because Florida Rule of Appellate Procedure 9.100(c) requires the filing of a petition for writ of certiorari with the clerk of the District Court within thirty (30) days after rendition of the order to be reviewed. "This time limit is jurisdictional". Id. at 411. Believing this to be an issue of first impression, the Johnson Court dismissed the appeal and certified to the Florida Supreme Court the same question certified in this case. Respondent's renewed Motion to Dismiss' relying upon Johnson, argued that Petitioner failed to file with the District Court of Appeal, Third District within thirty (30) days, resulting in the District Court of Appeal, Third District's lack of jurisdiction over this matter. The Third District agreed.

However, Johnson was decided incorrectly and should not have been followed. More correctly, the District Court of Appeal, Third District should have reaffirmed Eason, which was followed by the Fourth District in Couts, and disapproved Johnson. First, despite acknowledging that Florida Rule of Appellate Procedure 9.040(c) may require a different result, the Johnson Court ignored Florida Statute §59.45 which clearly prohibits dismissal based solely on Petitioner's "misconception of remedy". Second, the Johnson Court wrongly referred to the jurisdictional issue as one of first impression. In Eason, supra, the District Court of Appeal, Third District in fact ruled on this precise jurisdictional question, stating that a timely filed notice of appeal

will be treated as a timely filed petition for writ of certiorari if an appeal is not the proper remedy:

> ...the notice of appeal and the record thereon may be regarded and acted on as a petition for certiorari duly presented. Accordingly, we take jurisdiction and treat the appeal as a certiorari.

194 So.2d at 653. (emphasis added). Eason is consistent with Florida Rule of Appellate Procedure 9.040(c) and the Advisory Committee Note to said rule, which states:

> All filings in the case have the same legal effect as though originally filed in the court to which transfer is made.

Indeed, the Florida Supreme Court announced its approval of the treatment of an appeal as a petition for writ of certiorari in City of Deerfield Beach v. Vailiant, 419 So.2d 624 (Fla. 1982), aff'd 399 So.2d 1045 (Fla. 4th DCA 1981), expressing no doubt that for jurisdictional purposes a timely notice of appeal should be treated as a timely petition for writ of certiorari.

Further, both Johnson and the Third District's decision in this case are also contrary to Florida Statute §59.081, which is consistent with Florida Statute §59.45 (discussed above) and Florida Rule of Appellate Procedure 9.040(c) (discussed above). Florida Statute §59.081 states:

> Time for invoking appellate jurisdiction of any court ... (2) failure to invoke the jurisdiction of any such court within the time prescribed by such rules shall divest such court of jurisdiction to review such cause.

This provision, combined with Florida Statute §59.45 and Florida Rule of Appellate Procedure 9.040(c), clearly indicates that if a party timely invokes the jurisdiction of the District Court of Appeal, Third District by seeking an improper remedy, the District Court of Appeal, Third District has jurisdiction and should review the case. In this case, petitioner has invoked the jurisdiction of the District Court of Appeal, Third District within the time prescribed by the rules. Petitioner's notice of appeal was filed <u>within 30 days</u> of the rendition of the lower tribunal's order, as required by Florida Rule of Appellate Procedure 9.110(b).

Thus, the Third District's decision in this case ignores the clear legislative and judicial intent, as expressed in Article V, Section 2(a) of the Florida Constitution, Florida Statute §59.45 and Florida Rule of Appellate Procedure 9.040(c), that a party should not be denied review solely because the party sought an improper remedy. Before <u>Johnson</u>, <u>every</u> district had recognized this intent and treated appeals as petitions for a writ of certiorari when appropriate. If <u>Johnson</u> is followed, the intent of both the Florida Legislature and the Florida Supreme Court would be frustrated since the applicability of the above-mentioned statute and rule would be limited in an absurd manner. Specifically, an appellate court could only treat an appeal as a petition for writ of certiorari in two (2) situations: when a notice of appeal is timely filed with the

clerk in the lower tribunal, who by chance sends a copy to the District Court within thirty (30) days; or when the party realizes an improper remedy was sought and corrects its mistake within thirty (30) days.[2] More correctly, the rule established by the District Court of Appeal, Third District in Eason, which was followed by the Fourth District in Couts, as well as the statutes and rule referred to above, contain no such time limit on their applicability and do not depend on chance. Thus, the District Court of Appeal, Third District mistakingly abandoned its own authority in Eason and followed the recent decision in Johnson.

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2 The Johnson court recognized that:

> There is no requirement under the appellate rules that counsel file a copy of the notice of appeal with the appellate court. In practice, this Court is often served a copy by counsel for the appellant at the time it is filed below, but where this is not the case the court will ordinarily first obtain a copy of the notice when it is forwarded by the clerk of the lower tribunal.

518 So.2d at 411. Unfortunately for the petitioner in Johnson, the clerk of the lower tribunal sent the notice of appeal to the First District four days late. If this Court follows Johnson, cautious attorneys will file all notices of appeal in both the lower and appellate courts, resulting in excess paper and confusion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the certified question should be answered in the negative.

Respectfully submitted,

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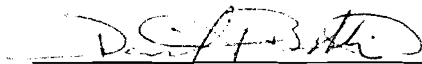
By:
DAVID T. BOBBITT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 12TH day of August, 1988 mailed to: JOHN R. DELLAGLORIA, ESQ., City Attorney, City of South Miami, 6130 Sunset Drive, South Miami, Florida 33143.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