IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 72,759

FILED
SID J. WHITE
SEP 26 1988
CLERK, SUPREME COURT
By
Deputy Clerk

VERONICA STIEGLITZ,

Petitioner

vs.

CITY COMMISSION, CITY OF SOUTH MIAMI,

Respondent.

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

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STATEMENT OF THE CASE AND FACTS

Respondent has accepted Petitioner's statement of the case and facts while noting specified areas of disagreement. Petitioner accepts the inclusion of additional facts in Respondent's statement while also noting that Respondent inaccurately characterizes Petitioner's Notice of Appeal which was timely filed with the Clerk of the Eleventh Judicial Circuit "R.1-75" as merely having been "served".

II. SUMMARY OF ARGUMENT

Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978), Southeast First National Bank v. Herin, 357 So.2d 716 (Fla. 1978) and State, ex rel. Diamond Berk Ins. Co. v. Carroll, 102 So.2d 129 (Fla. 1958) do not address the issue raised by the certified question and are therefore inapposite. City of Miami Beach v. Eason, 194 So.2d 652 (Fla. 3d DCA 167) holding that a timely notice of appeal is to be treated as a timely petition for writ of certiorari when a party seeks review of a Circuit Court appellate decision is correct. Johnson v. Citizen State Bank, 518 So.2d 410 (Fla. 1st DCA 1988) and its progeny are incorrect as they ignore established law. In this case, Petitioner has invoked the jurisdiction of the Appellate Court within the time prescribed by the rules. The Order granting Respondent's Motion to Dismiss ignores the clearly articulated constitutional, 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.

III. 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 THIRTY DAYS OF RENDITION OF THE ORDER.

1. THE SCOPE OF THE CERTIFIED QUESTION.

In an effort to finesse the alternative bases upon which Petitioner proposed the court should recognize that the timely filed notice of appeal here should be treated as a timely filed petition for writ of certiorari regardless of whether the lower tribunal transferred the notice of appeal to the appellate court within thirty days of rendition of the order appealed from, Respondent suggests that the scope of the certified question here is limited to the circumstances addressed in Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978). We disagree. The Lampkin facts as well as the holding are limited to a circumstance where the party seeking review has no misconception of appropriate remedy and merely fails to invoke the jurisdiction of the appellate court on a timely basis. Contrary to Respondent's argument, the question certified addresses the circumstance which occurred here in which Petitioner improperly perceived review to be available by an appeal and properly invoked the jurisdiction of the appellate court for that remedy on a

timely basis and now seeks to have that request for review treated as a proper and timely filed petition for certiorari. Hence, Lampkin, Southeast First National Bank v. Herin, 357 So.2d 716 (Fla. 1978) and State, ex rel. Diamond Berk Ins. Co. v. Carroll, 102 So.2d 129 (Fla. 1958) are neither controlling nor dispositive of the issue raised by the certified question.

2. THE FLORIDA DECISIONAL LAW.

Respondent asserts petitioner bases entitlement to relief on the fact that it filed an incorrectly styled pleading. Again, we disagree. Contrary to Respondent's argument, the timely notice of appeal here is indispensable to Petitioner's right to relief. Indeed, the District Court of Appeal, Third District, recognized in City of Miami Beach v. Eason, 194 So.2d 652 (Fla. 3rd DCA 167) that the Florida Constitution, the Appellate Rules and Florida Statutes required 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.

> . . .the notice of appeal . . . may be regarded and acted on as a petition for certiorari duly presented. . . . Eason, supra. (emphasis supplied)

Whereas Respondent suggests that Lacalle v. State, 479 So.2d 814 (Fla. 3rd DCA 1985) and Save Brickell Avenue, Inc. v. City of Miami, 393 So.2d 1197 (Fla. 3d DCA 1981) and Eason do not address the question of timeliness, the Eason court did so when it stated that an improperly filed notice of appeal should be regarded and acted on as a petition for certiorari duly presented. Though not

specifically addressed in Lacalle v. State, 479 So.2d 814 (Fla. 3d DCA 1985) and Save Brickell Ave., Inc. v City of Miami, 393 So.2d 1197 (Fla. 3d DCA 1967) it is at least implicit that since the review sought in each case was by direct appeal, the notice was filed properly in the circuit court when such remedy is sought. Neither case suggests that there was any effort to invoke the jurisdiction of the appellate court by any filing whatsoever in the district court.

Finally, it bears notice that until the decision in Johnson v. Citizens State Bank, 518 So.2d 410 (Fla. 1st DCA 1988) where the court recognized that Florida Rule of Appellate Procedure 9.040(c) might require a different result, no Florida court had reached the conclusion that the remedy by which review is sought though improper must nevertheless be commenced as if the proper remedy was sought. The decisions in Spector v. Trans World Airlines, 523 So.2d 704 (Fla. 4th DCA 1988); Gelinas v. City of South Miami, 522 So.2d 105 (Fla. 3d DCA 1988); Paul v. City of Miami Beach, 519 So.2d 1150 (Fla. 3d DCA 1988); Massaline v. Carter, _____ So.2d ______(Fla. 5th DCA Case No. 87-2098, opinion filed July 28, 1988) (13 FLW 1782) and Elmore v. City of Orange City, _______So.2d _______ (Fla. 5th DCA Case No. 88-565, opinion filed July 28, 1988) (13 FLW 1782) all adopt the reasoning in Johnson and are incorrect as they ignore established law.

3. FLORIDA CONSTITUTIONAL LAW, LEGISLATIVE ENACTMENTS AND SUPREME COURT RULES.

Respondent suggests that Petitioner has yet to come to terms with the timeliness issue or has sought to distract the court with an argument addressing incorrectly styled pleadings. Once more we disagree. To the contrary, it is the Johnson court, the decision of which respondent relies upon, which ignored article V, Section II(a) of the Florida Constitution and Florida Statute Section 59.45 in arriving at its decision. It was that court as well which acknowledged that Florida Rule of Appellate Procedure 9.040(c), would require a different result. No argument can obscure the constitutional mandate that "no cause . . . be dismissed because an improper remedy has been sought." (Article V, Section 2a, Florida Constitution). No case prior to Johnson, supra, has been presented which would relieve the District Court from its obligation under Florida Rule of Appellate Procedure 9.040(c) to treat all filings in this case as having the same legal effect as though originally filed where appropriate if seeking the proper remedy. (See Advisory Committee Note to Florida Rule of Appellate Procedure 9.040(c). Finally, Respondent offers no basis upon which the District Court may disregard the Legislature's mandate that misperception of the proper remedy for review, shall not alone be ground for dismissal. (Florida Statute §59.45).

The proposition asserted by respondent seeks to limit the legislative enactment, the appellate rule and the constitutional mandate to an artificial and indeed frivolous circumstance

wherein petitioner would have been obliged within thirty days of the rendition of the order sought to be reviewed, to have filed its notice of appeal in the District Court in order to avail itself of the provisions of Florida Appellate Rule 9.040(c). What respondent is really saying is that petitioner must have not only misconceived the remedy available for review but having done so, also improperly invoked the jurisdiction of the appellate court for the misconceived remedy, in order to avail itself of the provisions of Florida Appellate Rule 9.040(c). Accordingly, the only circumstances in which the District Court could properly take jurisdiction for review under the provisions of Florida Appellate Rule 9.040(c) would be where review is available only by certiorari and though the party seeking review perceives his remedy to be by appeal, he files his Brief in the District Court within thirty days of the order from which review is sought; or where review is available only by appeal and the party seeking review misperceives his remedy as available only by certiorari and he files his petition for certiorari in the Circuit Court within thirty days of the Order sought to be reviewed. Such is an absurd and indeed frivolous argument as if the party seeking review misperceives the remedy he will most probably pursue the misconceived remedy by invoking the Appellate Court's jurisdiction as provided for on the misconceived remedy.

This is indeed what the Eason court recognized and why it held 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.

CONCLUSION

For the reasons recited above as well as those which appear in the initial Brief of Petitioner, it is respectfully submitted that the certified question should be answered in the negative.

Respectfully submitted,

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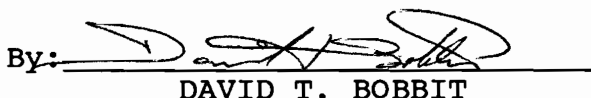
By: 
DAVID T. BOBBIT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of September, 1988, to: John R. Dellagloria, Esq., City Attorney, City of South Miami, 6130 Sunset Drive, Miami, Florida 33143.

DAVID T. BOBBITT