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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 73,239

H. W. JONES,

Petitioner,

vs.

OFFICE OF THE SHERIFF,

Respondent.

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The petitioner, H. W. Jones, will be referred to herein as the "petitioner" or "Mr. Jones." The respondent, Office of the Sheriff, will be referred to as "respondent" or the "Office of the Sheriff." References to the Record on Appeal will be designated "R.", followed by the appropriate page numbers out in brackets.

STATEMENT OF CASE AND FACTS

This brief is addressed to the merits of a petition invoking this Court's discretionary jurisdiction to hear a question certified by the First District Court of Appeal as being of great public importance. The certified question,

> WHEN A PARTY SEEKS APPELLATE REVIEW OF A NON-APPEALABLE ORDER, AND ASSUMING THE NOTICE OF APPEAL IS TIMELY FILED IN THE LOWER TRIBUNNAL, 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?

was certified in the instant case by the First District Court of Appeal. (See Appendix).

This question arose after the petitioner filed a notice of appeal in the Duval County Circuit Court of that court's order affirming a Civil Service Board recommendation of termination of the petitioner from his employment with the respondent, the Office of the Sheriff [R. 1-23, 40, Tr. 147-48]. The notice of appeal was filed in the office of the clerk of the circuit court on May 10, 1988, from an order rendered by the circuit court on April 13, 1988. On Monday, May 16, 1988, the first day the court was open to conduct its business after the expiration of the 30-day limit, a copy of the notice of appeal was received by the First District Court of Appeal. H.W. Jones v. Office of the Sheriff, ___ So.2d ___, 13 FLW 2255 (Fla. 1st DCA, October 4, 1988).

Thereafter, petitioner filed a motion requesting the First District to construe the notice of appeal and initial brief as a petition for writ of certiorari. Id. This request was granted but the court sua sponte denied the petition for writ of certiorari as untimely filed. Id. The First District then certified the instant question for review by this Court. Id.

Petitioner then filed a Notice to Invoke Discretionary Jurisdiction with the Florida Supreme Court, bringing the instant question before this Court.

SUMMARY OF THE ARGUMENT

Petitioner's notice of appeal was timely filed in the circuit court, and the petition for writ of certiorari relates back to that filing under the reasoning of Ceslow v. Board of County Commissioners, Palm Beach County, 428 So.2d 701 (Fla. 4th DCA 1983) and was therefore not untimely. Further, the petition for writ of certiorari is not barred as being filed in the wrong court, since Fla. R. App. P. 9.040(c) and (d) and subsequent committee notes provide that pleadings filed in a court without jurisdiction shall be treated as if correctly filed.

ARGUMENT

THE NOTICE OF APPEAL WAS A TIMELY FILED PETITION FOR WRIT OF CERTIORARI

The instant case presents the question certified as to great public importance by the First District Court of Appeal. H.W. Jones v. Office of the Sheriff, ___ So.2d ___, 13 FLW 2255 (Fla. 1st DCA, October 4, 1988). The petitioner requests compliance with the long standing practice, existing under Florida appellate rule, statute, and caselaw, of treating the Notice of Appeal as a petition for writ of certiorari, which should not be barred by technical failure to comply with the 30-day time limit for filing, since a notice of appeal was timely filed in the circuit court.

Florida caselaw has long empowered appellate courts to treat a notice of appeal as a petition for certiorari. In Bridges v. Williamson, 440 So.2d 400 (Fla. 2d DCA 1984), the court held that district courts of appeal have the discretion to treat an improperly filed appeal as a petition for a writ of certiorari. The case involved an order to dismiss a claim with leave to amend the complaint to allege compliance with technical standards. Id. The court elected to treat the appeal as if filed in proper form and proceeded to the merits of the claim. Id. Therefore, if an appellant follows an incorrect or inappropriate procedure, the appeal will not be barred due to technical defects of form or even in the type of relief sought.

Indeed, the Fourth District has allowed a petition for writ of certiorari to relate back to the date of circuit court filing

of an improvidently taken notice of appeal. In Ceslow v. Board of County Commissioners, Palm Beach County, 428 So.2d 701 (Fla. 4th DCA 1983), the court held that under Florida statute and rule, a notice of appeal and associated record may be treated as a petition for writ of certiorari for the purpose of invoking the court's jurisdiction, and thereafter notice may be amended into a formal petition. Id. Ceslow involved a petition for writ of certiorari, seeking to reverse a circuit court's order of dismissal of an earlier petition for writ of certiorari. The writ to the circuit court was filed after the petitioner had filed a timely notice of appeal, which was dismissed when the court directed the petitioner to file a writ of certiorari instead. Id. The circuit court then denied the writ as untimely filed, since it was filed after the expiration of the time limit. Id.

On appeal to the district court, it held that the petition related back to the date of the original notice of appeal, and therefore held the petition as timely filed, and instructed the lower court to reach the merits of the petitioner's claim. Id. The court allowed the petitioner's subsequently filed petition to be considered as an amended petition for writ of certiorari. Id. at 702. The court stated that any other result would be inequitable:

> The notice and record may be treated as a petition for purposes of invoking the court's jurisdiction. Thereafter the notice may be amended into a formal content of the petition and issue a show cause order if warranted. To allow the court to assess the content of

> the unamended notice and record would force the court to dismiss every notice as insufficient to support an order to show cause. Such an illogical and harsh result cannot be the intended effect of this statute whose obvious purpose is to provide a remedy for those who have mistakenly followed the wrong appellate procedure.

Id. at 703. Thus, the court declined to foreclose the petitioner from her remedy by application of a rigid time limit. The court found actual notice of appeal by the contents of the notice of appeal, thereby placing the respondent on notice of the appeal and preventing harmful prejudice. Id. at 702.

Identically, in the instant case, the petitioner filed timely notice of appeal in the circuit court from whose order relief was sought, and upon learning that the method of review was improper, filed a petition to convert the notice of appeal to a petition for writ of certiorari. The fact that the District Court of Appeal did not receive the notice of appeal should not result in an inequitable forfeiture of the remedy sought, under the Ceslow reasoning, since date of the petition for certiorari should relate back to the filing date of the notice of appeal.

Further, the clerk of the circuit court was under a duty to immediately transmit the notice and record of appeal where the circuit court had no jurisdiction. In Grove Press v. State, 152 So.2d 177 (Fla. 3d DCA 1963), the court adopted a policy that where the jurisdiction is questionable, an order of transfer should be made in order that the Supreme Court may have early and timely opportunity to determine the question of its jurisdiction. 152 So.2d at 178. The court created this policy so that the

"appeal may be heard and decided expeditiously in the proper appellate forum." Id.

By analogy, where the circuit court has doubtful jurisdiction over an appeal, as in the instant case where a petition for certiorari was the proper method of proceeding, and where the district court had the ability to treat such appeal as a petition for certiorari, the clerk should have transmitted the appeal to afford the District Court an "early and timely" opportunity to hear the appellant's claim. Instead, a prejudicial lapse occurred, which the District Court interpreted as a possible bar to its ability to hear the appeal.

In City of Miami Beach v. O'Hara, 166 So.2d 500 (Fla. 3d DCA 1966), the court acknowledged its discretion to overlook technical errors in an appeal, treating a non-appealable order as appealable and regarding the notice of appeal as a petition for certiorari. Id. at 600. In that case, the court held that the order from which the appellant had appealed was a non-final order, and therefore not subject to review. Id. The court nonetheless reached the merits of the appeal, and treated the notice of appeal as a petition for certiorari. Id. The court provided the relief asked for in the notice of appeal by reversing the trial court's order allowing the appellee to amend the original complaint after trial, finding this order a departure from the "essential requirements of the law." Id.

Similarly, in the instant case, a dismissal of the appeal in the instant case for an alleged technical defect, raised sua

sponte by the First District, would allow fundamental errors in the underlying litigation to stand, to the profound prejudice of the petitioner. The technical defect of de minimis untimeliness would work the inequitable result of a total bar to appellant's assertion of his right to an appeal in the instant matter. A technical delay of one day where the appeal was timely filed but transmitted by the circuit court six days later is a technical deficiency similar to the O'Hara appellant's attempt to appeal a non-appealable order, particularly where, as here, the District Court has demonstrated its willingness to proceed to the merits of petitioner's claims. The fact that the instant question was certified to this Court indicates the lower court's discomfort with the arbitrary bar to the right of appeal presented by a rigid application of the 30-day rule, where a petitioner has complied in a good faith, but mistaken, interpretation of the appellate procedure rules.

In City of Fort Lauderdale v. Couts, 239 So.2d 874 (Fla. 4th DCA 1970), the court held that although Florida circuit courts have final appellate jurisdiction of all cases arising in municipal courts, the district courts of appeal could take an appeal from such a court, even though a writ of certiorari would have been the only possible course of proceeding. Id. The court acknowledged that the Florida Constitution provided the route of appeal from state municipal courts, with circuit courts having the only jurisdiction for such claims. The court cited §59.45, Fla. Stat. (1987), for the proposition that when the remedy might

have been more properly sought by certiorari, a notice of appeal and the record thereon may be regarded as a petition for certiorari. Id. The court then reached the merits of the claim. Id.

Accordingly, since the motion to consider the notice of appeal as a petition for writ of certiorari was granted in the instant case, and the Ceslow holding allows the filing to relate back to the date of original filing of notice of appeal, the petitioner has perfected his right for the First District's consideration of the petition for writ of certiorari. This practice is consistent with the general provisions of the appellate rules, specifically Fla.R.App.P. 9.040(c) and (d), which provide:

> (c) Remedy. 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.
>
> (d) Amendment. At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural defect that does not adversely affect the substantial rights of the parties. (emphasis added).

In the commentary to these rules, the Committee Notes state:

> 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 effect as though originally filed in the court to which transfer is made.

Committee Notes to Fla.R.App.P. 9.040, 1977 Revision (1988). These notes state the general applicability of the committee's interpretations to the other provisions in the appellate rules, thereby stating the general policy provisions of all the rules. Allowing the petitioner's appeal to be heard is consistent with the policies of fairness and the general abhorrence of forfeiture of a party's right to appeal. The relief sought must therefore be granted.

Conversely, the case relied upon by the district court in the instant case, Johnson v. Citizens State Bank, 518 So.2d 410 (Fla. 1st DCA 1988), contains no direct authority nor any policy reasons for its holding denying jurisdiction. Id. at 411. The First District certified the question to this Court, acknowledging the lack of binding precedent and the possible conflict of its holding with Fla.R.App.P. 9.040(c). Id. Since the Johnson case, and its progeny, [1/] have been decided in the absence of guiding caselaw, the equities of an absolute bar to proceeding should be considered. The policy directives addressed in the committee notes to the appellate rules provide guidance in the absence of express caselaw. Therefore, the broad discretion of appellate courts to override the narrower scope of specific rules should be used to effectuate the interests of fairness and prevention of forfeiture of the right to appeal.

1/ Gilinas v. City of South Miami, 522 So.2d 104 (Fla. 3d DCA 1988); Paul v. City of Miami Beach, 519 So.2d 1150 (Fla. 3d DCA 1988); Spector v. Trans World Airlines, 523 So.2d 704 (Fla. 4th DCA 1988).

CONCLUSION

For the foregoing reasons, this Court should invoke its certiorari jurisdiction and reverse the decision of the First District Court of appeals below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bruce D. Page, Esquire, Assistant General Counsel, 1300 City Hall, Jacksonville, Florida 32202, by hand, this 29th day of November, 1988.

ATTORNEY