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IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,948

FILED
WHITE
1989
COURT
By
Deputy Clerk

ALVIN WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

The Petitioner, **ALVIN WILLIAMS,** will be referred to as the Defendant. The Respondent, **THE STATE** OF **FLORIDA,** will be referred to as the State. The letter "A" will designate the record on appeal, which consists of Petitioner's Appendix filed before the Fifth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

The State accepts the Defendant's Statement of the Case and Facts as a substantially accurate account of the proceedings below.

SUMMARY OF THE ARGUMENT

Certiorari jurisdiction does lie to review a circuit court order reversing a pretrial county court order. However, in the instant case the District Court had plenary appellate jurisdiction since the county court declared the statute unconstitutional. The Fifth District should have exercised its certiorari jurisdiction herein and vacated the void judgment of the circuit court. The Fifth District then should have transferred the cause to the proper forum and ruled on the merits. The Fifth District would then have been required to reverse the county court order since the case could have been deposed of, via a sworn motion to dismiss, without invalidating the statute.

POINT INVOLVED ON APPEAL

WHETHER THE FIFTH DISTRICT ERRED IN NOT EXERCISING ITS CERTIORARI JURISDICTION.

ARGUMENT

THE FIFTH DISTRICT ERRED IN NOT EXERCISING ITS CERTIORARI JURISDICTION.

The instant case has been consolidated with Fieselman v. State, Case No. *73,636* on the issue of what is the standard of review in the District Court when it is faced with a petition for writ of certiorari from a circuit court acting in its appellate capacity. The State, in Fieselman, agreed with the Third District's expansive interpretation of its certiorari jurisdiction. In the instant case, the State once again supports the Third District's and rejects the Fifth District's interpretation as overly narrow and restrictive. The State adopts the Third District's reasoning in total:

> I
>
> We consider first whether the decision of the circuit court is one properly reviewable by certiorari.
>
> In *Baker v. State, 518 So.2d 457 (Fla. 5th DCA 1988)*, the Fifth District refused to exercise its certiorari jurisdiction to review a circuit court's reversal of a county court's order dismissing a criminal information. Its reasoning was succinct: a circuit court's order on appeal reversing a county court's dismissal and a circuit court's order at the trial level denying a motion to dismiss "amount

to the same thing"; and since, without dispute, the latter is unreviewable by certiorari, the former is likewise unreviewable. Id. at 458.

[1] We do not agree that a trial court order denying a motion to dismiss criminal charges "amounts to the same thing" as a decision of a court, sitting in an appellate capacity, which reverses a trial court's dismissal of criminal charges. To be sure, in each instance the criminal charge remains pending in the trial court, and a plenary appeal to the court having appellate jurisdiction will lie from a future conviction. And, ordinarily, the availability of an eventual plenary appeal is said to bar certiorari review of an interlocutory decision of a trial court denying a motion to dismiss. *Martin-Johnson, Inc. u. Savage, 509 So.2d 1097 (Fla. 1987); Brooks u. Owens, 97 So.2d 693 (Fla. 1957); Kilgore u. Bird, 149 Fla. 570,* 6 **So.2d** *541 (1942).* However, in our review, this oft-stated rule does not bar certiorari review of an *appellate* decision of a circuit court which reverses a trial (county) court's order granting a motion to dismiss.

[2] The sole criterion for certiorari review of a circuit court appellate decision is whether the decision departs from the essential requirements of the law, *Combs u. State, 436 So.2d 93 (Fla. 1983); see also City of Deerfield Beach u. Vaillant, 419 So.2d 624 (Fla. 1982),* and the availability vel non to the ultimately convicted defendant of an adequate remedy by appeal is

> simply irrelevant.[1] This is because, unlike a trial court decision which concerns and binds only the immediate litigants, an appellate decision-including, of course, one by the circuit court-establishes law beyond the case in which the decision is rendered. Even as the availability of an adequate remedy by appeal in the event of ultimate conviction is not a ground upon which the Florida Supreme Court would deny certiorari review of an appellate decision of a district court reversing a trial court's dismissal of criminal charges, it is not a ground for denial of certiorari review in the present case. We thus find no impediment to our certiorari jurisdiction and in this respect, disagree and certify conflict with the Fifth District's decision in ***Baker** u. **State, 518 So.2d 457.***
>
> [1] In ***Combs,*** the supreme court modified the decision in ***Combs** u. **State, 420 So.2d 316 (Fla. 5th DCA 1982),*** in which the Fifth District had adopted, as it later did in ***Baker,*** a similarly narrow view of its certiorari jurisdiction over circuit appellate decisions.

Fieselman v. State, 537 So.2d 603, 604 (Fla. 3d DCA 1988); See also, Mitchell v. State, 538 So.2d 106 (Fla. 4th DCA 1989).

The fact that the Fifth District had certiorari jurisdiction to review the circuit court's decision reversing the pretrial county court order is, however, irrelevant to

the jurisdictional issue in question. The Fifth District had plenary appellate jurisdiction over this cause, pursuant to Article V, Section 4(b)(1) Florida Constitution.

The circuit court has jurisdiction as prescribed by the Constitution and statutes. State v. Trammel, 140 Fla. 500, 192 So. 175 (1939). Article V, Section 5 Florida Constitution provides that the circuit court has jurisdiction over all appeals from county court except as provided by statute. Section 26.012 Florida Statutes excepts from the circuit court's jurisdiction appeals of county court orders or judgments declaring a state statute. Therefore, a District Court has plenary appellate jurisdiction when a county court declares a state statute unconstitutional. State v. Deese, 495 So.2d 286 (Fla. 2d DCA 1986); State v. Block, 428 So.2d 782 (Fla. 4th DCA 1983). Art. V, Sec. 4(b)(1) Florida Constitution.

The question that remains is what is to be done with the circuit court's judgment reversing the county court's finding that the litter law statute was unconstitutional. The State submits that the circuit court's judgment is void and the action requires transfer to the proper forum, the District Court.

A judgment is void if it is rendered by a court without jurisdiction. Scalfoni v. County of Dade, 323 So.2d 675 (Fla. 3d DCA 1975). The circuit court's decision reversing the county court's order declaring the litter law statute unconstitutional, therefore was void. Defendant's timely invoking the Fifth District's certiorari jurisdiction, required the Fifth District to grant certiorari relief by vacating the circuit court's decision. Once the Fifth District vacated the circuit court decision, it should have required the cause to be transferred. Fla.R.App.P. 9.040(c). The transfer could have been done directly or by ordering the circuit court to initiate transfer proceedings. Upon transfer to the Fifth District, the court would then have been able to exercise its plenary jurisdiction to decide the appropriateness of the county court's order declaring the litter law unconstitutional.

Since it is clear that the Fifth District had certiorari jurisdiction, its erroneous failure to exercise this jurisdiction requires that this Court exercise its prerogative and not reach the merits of the constitutionality of the litter law. Lawrence v. Florida East Coast Railway Co., 346 So.2d 1072 (Fla. 1977). The main reason for declining review on the merits is that Fifth District would have to reverse the order declaring the statute unconstitutional on the recognized principle that a court

should not pass upon a constitutional question and invalidate a statute unless such action is necessary to dispose of the case. In re Estate of Sale, 227 So.2d 199 (Fla. 1969). This principle is applicable herein since the Defendant, at the time he sought to declare the statute constitutional, filed a Rule 3.190(c)(4) motion wherein he contended that the undisputed facts did not establish a prima facie case of guilt. (A. 9-11). Had the county court initially ruled upon the sworn motion to dismiss, the granting of the same would have disposed of the case without it being necessary to declare the statute unconstitutional. Therefore, the Court should require that the Fifth District remand the cause to the county court to determine the sworn motion to dismiss.

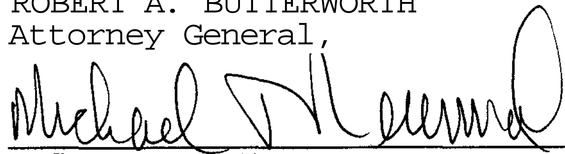
Finally, if this Court decides to exercise its prerogative and reach the merits, then the State submits that the litter law does not contain the unconstitutional infirmities that Defendant alleges. The statute makes unlawful the public disposal of litter, except in containers or areas lawfully provided. The law is not overbroad or vague since it clearly states what conduct is prohibited; the abandoning of litter in public areas. Defendant's real complaint is that the statute is unconstitutional as applied to him. Clearly, this is not a constitutional defect but rather that Defendant did not commit the proscribed conduct, which claim should be litigated pursuant to Rule 3.190(c)(4).

CONCLUSION

Based on the foregoing points and authorities, the State respectfully requests that this Court quash the opinion of the District Court and require the court to exercise its jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General,



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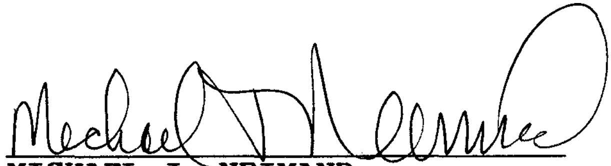
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON THE MERITS** was furnished by mail to **NATHAN G. DINITZ,** Attorney for Petitioner, 600 Silver Beach Avenue, Daytona Beach, Florida 32118, on this 28 day of July, 1989.



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