IN THE SUPREME COURT OF FLORIDA

GREGORY CAPEHART,

Appellant,

v. CASE NO. 74,231

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

CROSS-REPLY BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

The routine appointment of the Public Defender at the defendant's first appearance hearing, conducted via closed circuit television, did not preclude subsequent police-initiated contact with this defendant nor did it warrant suppression of Capehart's voluntary confession to law enforcement.

ARGUMENT

ISSUE ON CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION.

The Appellant/Defendant, Gregory Capehart, argues that this Court should decline to review the State's cross-appeal because the Notice of Cross-Appeal was not timely filed. For the following reasons, there is no jurisdictional impediment to this court's review of the State's cross-appeal.

Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure provides, in part, that the State may appeal a pre-trial order suppressing a confession. In addition, Rule 9.140(c)(1)(H), Florida Rule of Appellate Procedure, authorizes the State to appeal a trial court's ruling on a question of law when a convicted defendant appeals his judgment of conviction. Rule 9.140(c)(2), Florida Rule of Appellate Procedure, provide that the State's notice of cross-appeal shall be filed within ten (10) days of service of the defendant's notice of appeal.

In civil cases, the time for filing a cross-appeal notice is non-jurisdictional, *see* Agrico Chemical v. Dept. of Environmental Reg., 380 So.2d 503 (Fla. 2d DCA 1980); Brickell Bay Club Condominium Association, Inc. v. Forte, 379 So.2d 1334 (Fla. 3rd DCA 1988). This same rule applies in criminal cases, Walker v. State, 457 So.2d 1136 (Fla. 1st DCA 1984), rev. denied, 469 So.2d 750.

In Walker, the court held:

> We hold that the filing period for the filing of cross-appeal by the state in a criminal case is procedural rather than jurisdictional. Jurisdiction over the cause is acquired by the appellate court upon the timely filing of the notice of appeal. See, e.g. Hollywood v. Clark, 153 Fla. at 501, 15 So.2d 175 (1943). Because the court gains jurisdiction over the entire case at the time the notice of appeal is filed, neither the timely filing of the notice of cross-appeal, nor the failure to timely file such a notice will effect the jurisdiction of the appellate court. As the Third District Court of Appeal succinctly stated:
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> > *[S]ince the jurisdiction of the appellate court is invoked by the filing of the initial notice of appeal,. . . the notice of cross-appeal is properly regarded as no more than a subsequent procedural step in the appellate process. Brickell Bay Condominium Association, 379 So.2d at 1335.*
>
> Walker v. State, 457 So.2d at 1137.

When a defendant will not suffer prejudice or be deprived of adequate notice, the court may, in its sound discretion, allow a party to file an untimely notice of cross-appeal. Agrico Chemical, *supra*. In this case, the defendant has neither alleged nor shown any prejudice resulting from the timing of the filing of the notice of cross-appeal and, therefore, the Petitioner's jurisdictional claim should be rejected.

The Defendant never invoked his right to counsel during custodial interrogation. The Pasco County Trial Court granted the defendant's motion to suppress his confession for the reason "that the confession given to Detective Tom Muck and Detective Jean Caruso on April 12, 1988 was obtained after the defendant, GREGORY KEITH CAPEHART, had been appointed an attorney at his initial appearance in Orange County, Florida." (R. 935).[1] The first appearance hearing conducted in Orange County was conducted *via* closed circuit television. (R. 1015, 1019, 1020). Here, the defendant was not face-to-face with an investigator during a custodial interrogation but was one of a roomful of defendants routinely advised by a Judge *via* a television screen that a public defender would be appointed. (R. 1019, 1020). To equate this perfunctory appointment during a televised first appearance proceeding with the invocation of the right to counsel during interrogation is to now create a *per se* bar to any police initiated interview with the all indigent defendants subsequent to every first appearance hearing. Such a sweeping policy handcuffing law enforcement in the legitimate investigative process is not warranted in any Fifth Amendment or forced Sixth Amendment scenario such as this.

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[1] The Trial Court found that Capehart's indication that he could not afford a lawyer and wanted a Public Defender, made in response to a County jail employee's required routine inquiry and completion of a standard booking form, did not constitute a request for counsel so as to bar any law enforcement officer thereafter from interrogating Capehart. (R. 1041).

The defendant relies, in part, on Michigan v. Jackson, 475 U.S. 625, 89 L.Ed.2d, 631, 106 S.Ct. 1404 (1986). Jackson was distinguished by the Court in Patterson v. Illinois, 487 U.S. 285, 101 L.Ed.2d 261, 108 S.Ct. 2389 (1988) in which the United States Supreme Court held that an accused who was given his Miranda warnings by the police during post-indictment questioning was held to have made a knowing and intelligent waiver of his Sixth Amendment right to counsel. In Patterson, the defendant, after being informed by the police that he had been indicted for murder twice indicated his willingness to discuss the crime during interviews initiated by law enforcement. On both occasions, Patterson was read a form waiving his rights under Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602. In holding that the post-indictment questioning that produced Patterson's incriminating statements did not violate his Sixth Amendment Right to counsel, the United States Supreme Court discussing, *inter alia*, Michigan v. Jackson, stated:

> There can be no doubt that petitioner had the right to have the assistance of counsel at his postindictment interviews with law enforcement authorities. Our cases make it plain that the Sixth Amendment guarantees this right to criminal defendants. *Michigan v. Jackson*, 475 U.S. 625, 629-630, 89 L.Ed.2d 631, 106 S.Ct. 1404 (1986); *Brewer v. Williams*, 430 U.S. 387, 398-401, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977); *Massiah v. United States*, 377 U.S. 201, 205-207, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964). Petitioner asserts that the questioning that produced his incriminating statements violated his Sixth Amendment right to counsel in two ways.

> Petitioner's first claim is that because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him. See Brief for Petitioner 30-31; Tr of Oral Arg 2, 9, 11, 17. He equates himself with a preindictment suspect who, while being interrogated, asserts his Fifth Amendment right to counsel; under *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981), such a suspect may not be questioned again unless he initiates the meeting.
>
> Petitioner, however, at no time sought to exercise his right to have counsel present. The fact that petitioner's Sixth Amendment right came into existence with his indictment, i.e., that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in *Michigan v. Jackson*, *supra*, which applied *Edwards* to the Sixth Amendment content. We observe that the analysis in *Jackson* is rendered wholly unnecessary if petitioner's position is correct: under petitioner's theory, the officers in *Jackson* would have been completely barred form approaching the accused in that case unless he called for them. Our decision in *Jackson*, however, turned on the fact that the accused "ha[d] asked for the help of a lawyer" in dealing with the police. *Jackson*, *supra*, at 631, 633-635, 89 L.Ed.2d 631, 106 S.Ct. 1404. (e.s.)
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> Patterson, 487 U.S. at 270, 271.

The Jackson request for counsel was made at arraignment, a proceeding to which the Sixth Amendment applies. A first appearance hearing held pursuant to Rule 3.130(b), Florida Rule

of Criminal Procedure does not implicate the Sixth Amendment right to counsel. State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984). In Douse, the police deliberately elicited incriminating statements from a defendant through surreptitious means, in violation of Florida's constitutional right to assistance of counsel.

In Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), the defendants were denied their right to counsel at a line-up conducted subsequent to the defendant's first appearance. Because the defendant's right to counsel under Florida law had attached at the time of the line-up, the evidence derived from the line-up should have been suppressed. In granting the Defendant's motion to suppress in the instant case, the Trial Court commented:

> ". . . the presiding Judge at the first appearance hearing appointed a Public Defender to represent this defendant. While I suspect that the intention was to appoint a Public Defender perhaps only while the defendant was in the custody of the Orange County -- wherever he was in custody at. It was apparently not the sheriff, but whoever operates the jail -- that he's in the custody of somebody, technical custody of the sheriff's department. I suspect that the real intention of the Judge was to have a Public Defender to refer to as long as he was in Orange County.
>
> However, having appointed a Public Defender for the defendant, I think the police officers from Pasco County knew or should have known if such had occurred, and had an obligation before questioning the defendant further, to determine if, in fact, the appointment of a Public Defender was intended only for the purpose of that hearing.
>
> I think as long as the record reflects that an attorney was appointed, the cases cited require that after his showing that an attorney was unavailable or was rejected by the defendant, that the Public Defender or Public Defender's representative or assistant be present before any additional questioning..." R.1042

Although an Indictment had been rendered in another county at the time of petitioner's first appearance, it is clear that the trial court's ruling was premised solely on the basis of the appointment of counsel at the first appearance hearing, a proceeding which does not give rise to a Sixth Amendment claim. Under the facts of this case, the routine appointment of the public defender at the defendant's first appearance hearing, conducted *via* closed circuit television, did not preclude subsequent police-initiated contact with the suspect nor did it warrant suppression of Capehart's confession.

CONCLUSION

Based upon the foregoing facts, arguments and authorities, the Order of Suppression should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to The Office of the Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, on this 4th day of January, 1991.

K Blanco
OF COUNSEL FOR APPELLEE