OIA 5-8-90

IN THE SUPREME COURT OF FLORIDA



ANTONIO MARTINEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO 74,497

# PETITIONER'S REPLY BRIEF ON THE MERITS

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## IMINA STATEMENT

The Petitioner was the Appellant in the court below and the Defendant in the trial court. Petitioner was the Appellee in the court below and the Prosecution in the trial court.

## ARGUMENT

### THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS PETITIONER'S CONFESSION.

For the first time in the annals of this case Respondent has claimed that the instant issue should not be addressed because it is not dispositive of the instant case. However, such a claim is without merit.

Certainly, a prosecutor's stipulation as to dispositiveness of a confession is controlling. Zeialer v. State, 471 So.2d 172 (Fla. 1st DCA 1985). Respondent relies on Turner v. State, 429 So.2d 318 (Fla. 1st DCA 1982) and Morgan, III v. State, 486 So.2d 1356 (Fla. 1st DCA 1986) to support its claim that the prosecutor's stipulation can be ignored. However, as explained in Zeigler, supra, reliance on the withdrawn opinion in Turner, supra, is misplaced:

> Appellee suggests that the question of whether an issue preserved for review upon a nolo contendere plea is dispositive is jurisdictional, and hence a proper subject for review here, citing *Turner* v. *State*, 429 So.2d 318, 319 (Fla. 1st DCA 1982). In *Turner*, on rehearing we receded from language in our original opinion in which we indicated that an appellate court could determine for itself whether an issue stipulated by the parties as being dispositive to a case was in fact dispositive, stating: "... [W]e do not address any question of whether or not a stipulation entered into between the state and defense should be honored on appeal...." Id. at 320. Accordingly, *Turner* is not controlling, and we may look elsewhere for guidance on the question of "going behind" stipulations of dispositiveness.

471 So.2d at 175-176 (emphasis added). Moraan, supra, is distinguishable because the parties agreed that there would be a trial if the appellate court reversed. Thus, the stipulation as to

dispositiveness was not a true stipulation as to dispositiveness. Such an non-binding stipulation is not present in the instant case.

Without a mini-trial on this issue, only the parties in the lower court can truly know whether the issue is dispositive of the case. In Zeialer, supra, the court recognized this in holding that due to judicial economy,[1] and the fact that the parties knew the nature of the case, a stipulation as to dispositiveness would be binding on the parties and would not be reviewed by the appellate court:

> In resolving the conflict, the third district examined *Brown* v. *State,* 376 So.2d 382 (Fla. 1979), in light of *Jackson* v. *State,* 382 So.2d 749 (Fla. 1st DCA 1980), *aff'd*, 392 So.2d 1324 (Fla. 1981). The court noted that Brown's requirement that an issue be dispositive before the issue could be raised on appeal from a nolo contendere plea was grounded on a concern for judicial efficiency; that is, unless the issue raised is dispositive, and appeal will not end litigation in the particular, but will only postpone it. 376 So.2d at 384. The *Finney* court noted that the joint stipulation procedure sanctioned in *Jackson* was similarly bottomed; the trial court would have no need to hear testimony to establish whether or not the issue was dispositive, as would be the case absent the stipulation. Moreover, the *Finney* court, recognizing that the binding nature of a stipulation of dispositiveness supported the parties in their exercise of litigational strategy, observed:
>
> > A stipulation is the parties' recognition that, for whatever reason, they have presented all of the evidence that they car to and each is willing to abide by the appellate consequences regarding the grant or denial of the motion to suppress.

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[1] Judicial economy was the basis for the rule requiring dispositiveness. See Brown v. State, 376 So.2d 382 (Fla. 1979).

> 420 So.2d at 642. For these reasons, we hold that a stipulation voluntarily entered into by all parties that an issue preserved for appeal by a defendant's nolo contendere plea is dispositive will be so considered by this court. As a result, we do not re-examine the stipulation entered into here between appellant and the state.

471 So.2d at 176 (footnotes omitted) (emphasis added). Likewise, the stipulation should not be re-examined to avoid the understanding of the evidence by the prosecutor and defense below.[2]

Moreover, even if the Respondent is permitted to renege on the stipulation of the trial prosecutor so as to have the dispositiveness issue re-examined, the record does not demonstrate that the taped confession was not dispositive of the case. The earlier oral statement of Petitioner has not been shown to be the same in content as the taped statement. More importantly, there is absolutely no claim that the oral statement would be admissible in a trial setting. While the statement may be admissible during a motion to suppress, the statement may be totally inadmissible as substantive evidence during trial. Both the prosecution and defense may have realized this and thus forgone even the need for a hearing on the oral statement.[3] Thus, the dispositiveness cannot

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[2] The state should not be permitted to take one position in the lower court and then take a completely opposite position in the appellate court. State v. Adams, 378 So.2d 72 (Fla. 3d DCA 1979); State v. Schmitz, 450 So.2d 1254 (Fla. 3d DCA 1984). This is especially true where the prosecutor in the court below knew of the nature of its case and agreed that the suppression would be dispositive of the case.

[3] This would be part of the reason one should not go behind a stipulation -- one is not aware of the evidence regarding the admissibility of other evidence because it may not be in dispute. Only the parties below are aware of such evidence. For instance, this Petitioner has confessed to another murder due to improper police tactics. In Martinez v. State, 545 So.2d 466 (Fla. 4th DCA

be properly re-examined on appeal. It is also improper for the state to stipulate, thus causing Petitioner to plead no contest in order to review the issue, and to later claim that the issue is not dispositive and that the plea should stand as is. See Lopez v. Dublin Co., 489 So.2d 805 (Fla. 3d DCA 1986) (stipulations are binding upon the parties and the trial and appellate courts).

As to the merits, Respondent claims that there was nothing that could be construed as an equivocal indication that Petitioner wanted counsel. However, as fully explained in Petitioner's brief on the merits there was such an indication. See Fields v. State, 402 So.2d 46 (Fla. 1st DCA 1981); United States v. Gonzalez, 833 F.2d 1464, 1466 (11th Cir. 1987). Of course, once there is an equivocal statement as made in this case, further questioning must cease until the equivocal statement is clarified. Thompson v. State, 548 So.2d 198 (Fla. 1989). The fact that Petitioner was previously advised of his Miranda rights and indicated that he understood his rights does not obviate the need for clarification. See Fields v. State, 402 So.2d 46, 47 (Fla. 1st DCA 1986) (reversal for failure to clarify where "Appellant was, in formal terms, repeatedly advised of and said that he understood his Miranda rights, but upon being asked if he wanted a lawyer his response was that "I can't afford to get one."). Here the equivocal statement

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1989) it was noted that "Martinez, an illegal alien with an extremely limited education," confessed after being confronted with the spectre of the electric chair and other improper influences. 545 So.2d at 467. Petitioner's confession was held inadmissible. The use of the same type of tactics in this case may have led the prosecutor to believe that the other statements were clearly inadmissible and that the suppression of the taped statement would be dispositive of the case.

was not clarified. Instead, the translation shows that Petitioner was merely asked if he wanted to talk:

> [PEREZ]: (Indiscernible) and to have a lawyer present, you can do that, do you understand that?
>
> [PETITIONER]: But what about if I don't have any money?
>
> [PEREZ]: But do you understand the rights that I am reading to you, do you understand?
>
> [PETITIONER]: Yes.

(R109). Petitioner was never asked if he wanted a lawyer (R109-110). Such does not constitute a clarification of the statement. See Thompson v. State, supra (statement "You never told us that you wanted an attorney, did you?" did not constitute the requisite clarification).

Finally, Respondent claims that the error was harmless. However, the person who knows the state's case best, the prosecutor, stipulated that this issue was dispositive of the case. Thus, the error cannot be deemed harmless. Moreover, even if there was no stipulation, the existence of another statement, which was made prior to the taped statement, would not make the error harmless. Such a statement was made before Petitioner's statement indicating that he did not understand he had the right to an attorney even if he could not afford one. Thus, the statement would also be inadmissible. See Fields, supra. The error in this case cannot be deemed harmless.

## CONCLUSION

Based on the foregoing argument and the authorities cited therein, Petitioner respectfully requests this Honorable Court to reverse his conviction and sentence and to remand this case with appropriate directions.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SYLVIA H. ALONSO, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 5th day of April, 1990.

Jeffrey L. Anderson
Of Counsel