045 w/app.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,492

Fla. Bar No. 062667

LAZARO RUBEN GONZALEZ,

Petitioner,

vs.

METRO DADE POLICE DEPARTMENT,

Respondent.
_____/

BRIEF OF PETITIONER ON JURISDICTION

PERSE, P.A. & GINSBERG, P.A.
410 Concord Building
Miami, Florida 33130
(305) 358-0427
and
WILLIAM CAGNEY, III, ESQ.
3400 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-1411
Attorneys for Petitioner

TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

I.

INTRODUCTION

Petitioner ("GONZALEZ") was forfeiture respondent in the trial court and appellant in the District Court of Appeal. Respondent ("DADE POLICE") was trial court petitioner and appellate court appellee. In the District Court of Appeal petitioner filed a motion to relinquish jurisdiction to the trial court to rule on a motion for rehearing which pended when his notice of appeal was filed. In the decision sought to be reviewed the appellate court denied that motion.

The symbol "A" shall stand for petitioner's rule required appendix filed contemporaneously herewith.

All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

JURISDICTIONAL STATEMENT

This proceeding has been instituted, and the jurisdiction of this Court is invoked, under the aegis of Article V, § 3(b)(3) of the Florida Constitution--as amended April 1, 1980--and Rule 9.030(2), Fla. R. App. P., petitioner contends that the decision to be reviewed is in express, direct conflict with the decisions rendered by the District Courts of Appeal--First and Fourth Districts--in: LEOPARD v. STATE, 489 So. 2d 859 (Fla. 1 DCA 1986); LLOYD v. HARRISON, 489 So. 2d 856 (Fla. 1 DCA 1986); HATHCOCK v. STATE, 492 So. 2d 756 (Fla. 4 DCA 1986); PARK v. BAYVIEW VILLAGE CONDOMINIUM ASS'N., INC., 468 So. 2d 1116 (Fla. 4 DCA 1985).

III.

STATEMENT OF CASE AND FACTS

In the decision sought to be reviewed (A. 1-6), the District Court of Appeal, in pertinent part, stated and held:

* * *

"The trial court entered a final judgment of forfeiture on July 6, 1990. On July 16, 1990, the respondent Gonzalez timely filed a motion for rehearing of this judgment. Thereafter, on August 3, 1990, prior to a hearing on or disposition of the motion for rehearing, he filed a notice of appeal from the final judgment. Gonzalez now moves this court to 'relinquish jurisdiction' over the cause to the trial court for a determination of the rehearing motion which he contends is pending before it. We deny the motion on the basis of the familiar and what we conclude is the still-existing rule that the filing of a notice of appeal constitutes an abandonment of a then-pending post-judgment motion which simultaneously confers sole jurisdiction over the cause in the appellate court and deprives the trial court of authority to consider the motion.

"There can be no question that the rule that a party abandons a post-final judgment motion by filing a notice of appeal to review that very judgment is a long and firmly established one. . . . [citations omitted]. . . Indeed, the supreme court has often stressed that the adoption of any other rule would 'result in utter chaos in the appellate processes.' [Citation omitted.] . . . . and 'complete confusion in the disposition of litigation.' [Citation omitted.]

"In the minds of some, however, language in the case of Williams v. State, 324 So. 2d 74 (Fla. 1975), has cast doubt upon this conclusion. We do not believe this doubt is justified. In Williams, of course, the court adopted a so-called 'limbo jurisdiction' doctrine which in that case precluded dismissal when a notice of appeal was 'prematurely' filed before the recording and thus the rendition of the final judgment to which it was directed. This principle cannot, in our view, be properly applied so as to suspend the finality of a final judgment until the disposition of an earlier filed post-trial motion when the appellant has voluntarily taken a step, by bringing the appeal, which is totally inconsistent with the pendency of that motion, and has thus, in effect, elected his remedy. [Citation omitted.]

"The contrary view rests upon the statement in Williams that:

> "'This rule [of non-dismissal] shall apply to such situations as when the defendant filed his notice of appeal:
>
> * * *
>
> "'3. After the written judgment is filed for recording, but before a post-trial motion is decided.'"
>
> * * *

Williams, 324 So. 2d 79-80. It seems clear to us that this sentence may not properly be taken to abrogate the abandonment doctrine. First, but perhaps least significant, is the fact that the statement in question is complete dictum, totally unnecessary and in fact irrelevant to the disposition of the issue which was actually before the court. Second, it is simply impossible to believe that the court could have intended to overrule--without citation, discussion or awareness of the fact that it was doing so--a long line of authority in which it had so emphatically expressed its opinion of not only the wisdom of the doctrine, but its necessity. Finally, acknowledging that even dicta, when uttered by the supreme court, is persuasive authority, the critical statement can be and has been properly applied without in any way departing from the rule of abandonment. Thus in Bianco v. Bianco, 383 So. 2d 1120 (Fla. 4th DCA 1980), the court held that the statement was applied to uphold the timeliness of a notice of appeal filed during the pendency of a motion for rehearing on the ground that the fact of its abandonment constituted the 'disposition' of the motion and thus the 'rendition' of the final judgment under Florida Rule of Appellate Procedure 9.020(g). [Emphasis the court's.] [Citation omitted.] This obviously correct ruling is fully consistent with both the Williams language and the continued viability of the abandonment rule--indeed, it is entirely dependent upon it. Under familiar rules of judicial decision making, which include the propriety of preserving supreme court doctrines which have not been departed from either expressly or necessarily by implication. . . [Citations omitted.] . . . while giving effect to the words themselves, this is the construction which we should and do adopt.

"For these reasons, as this court has consistently held, we again hold that the abandonment rule survives Williams and applies today. [Citations omitted.] . . . We indicate our disagreement with the cases that hold to the contrary. E.g., Leopard v. State, 489 So. 2d 859 (Fla. 1st DCA 1986); Lloyd v. Harrison, 489 So. 2d

856 (Fla. 1st DCA 1986); Hathcock v. State, 492 So. 2d 856 (Fla. 1st DCA 1986); Park v. Bayview Village Condominium Ass'n, Inc., 468 So. 2d 1116 (Fla. 4th DCA 1985)." *

* * *

IV.

POINT INVOLVED

WHETHER THE DECISION SOUGHT TO BE REVIEWED IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS RENDERED BY THE DISTRICT COURTS OF APPEAL--FIRST AND FOURTH DISTRICTS--IN: LEOPARD v. STATE, supra; LLOYD v. HARRISON, supra; HATHCOCK v. STATE, supra; AND PARK v. BAYVIEW VILLAGE CONDOMINIUM ASS'N., INC., supra.

V.

SUMMARY OF ARGUMENT

Petitioner contends that the decision sought to be reviewed is in acknowledged direct conflict with the decisions rendered in the cited cases. There is an important and embarrassing conflict between the districts regarding a question of great public import. This Court should take jurisdiction and resolve the conflict.

VI.

ARGUMENT

A.

APPLICABLE JURISDICTIONAL PRINCIPLES

Petitioner does not believe that the 1980 amendment to Article IV as construed by the decisions rendered by this Court in JENKINS v. STATE, 385 So. 2d 1356 (Fla. 1980) and DODI PUBLISHING CO. v. EDITORIAL AMERICA, S.A., 385 So. 2d 1369 (Fla. 1980) changes in any appreciable way the guidelines

* Please note the acknowledgment of express and direct conflict.

utilized to ascertain and/or establish the existence of "direct conflict" in a case such as this which does not fall within the JENKINS and DODI rules. That is to say, this Court has jurisdiction to review the decisions of District Courts of Appeal on direct conflict grounds to resolve embarrassing conflict between such decisions. Jurisdiction may still be invoked where a District Court of Appeal: (1) announces a rule of law which conflicts with a rule previously announced by another Florida appellate court; or (2) applies a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by a Florida appellate court; or (3) misapplies precedent; or (4) misapplies and/or refuses to apply applicable law to a case under consideration. See Article IV, § 3, Florida Constitution; WALE v. BARNES, 278 So. 2d 601 (Fla. 1973); BELCHER v. BELCHER, 271 So. 2d 7 (Fla. 1972); and NIELSEN v. CITY OF SARASOTA, 177 So. 2d 731 (Fla. 1960). This Court's jurisdiction is discretionary.

B.

THE DIRECT CONFLICT WITH THE CITED CASES

In the decision sought to be reviewed, the District Court squarely held that "the filing of a notice of appeal constitutes an abandonment of a then-pending post-judgment motion which simultaneously confers sole jurisdiction over the cause in the appellate court and deprives the trial court of authority to consider the motion." The cited cases squarely hold to the contrary. The express and direct conflict is

obvious. In the decision sought to be reviewed the District Court acknowledged the existence of the conflict.

VII.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the decision sought to be reviewed is in express and direct conflict with the decisions rendered by the District Courts of Appeal--First and Fourth Districts--in the cited cases. This Court should grant a writ of certiorari and enter an order setting this cause for briefing and consideration on the merits.

Respectfully submitted,

PERSE, P.A. & GINSBERG, P.A.
410 Concord Building
Miami, Florida 33130
(305) 358-0427
and
WILLIAM CAGNEY, III, ESQ.
3400 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131
(305) 371-1411
Attorneys for Petitioner

By: _____
Edward A. Perse

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner was mailed to the following counsel of record this 1 day of March, 1991.

ARTHUR NEHRBASS, ESQ.
7580 S.W. 176th Street
Miami, Florida 33157

_____
Edward A. Perse