IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,492

District Court of Appeal, Third District Case No. 90-1822

Fla. Bar No. 062667

IN RE: FORFEITURE OF
$104,591 IN U.S. CURRENCY

LAZARO RUBEN GONZALEZ,

Petitioner,

vs.

METRO DADE POLICE DEPARTMENT,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

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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 but acknowledged that its decision was in express and direct conflict with a line of cases decided, inter alia, by the District Court of Appeal, First and Fourth Districts.

The symbol "A" shall stand for the appendix previously filed by petitioner in lieu of the record on appeal.* All emphasis appearing in this brief is supplied by counsel unless otherwise noted.

II.

STATEMENT OF CASE AND FACTS

In the decision sought to be reviewed dated February 19, 1991 (A. 1-6), the District Court of Appeal, in pertinent part, stated and held:

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* This Court's order of May 16, 1991, requires that this brief be filed on June 10, 1991, and the record on appeal by July 5, 1991. Events have moved so rapidly that the record on appeal has not yet been filed with the Clerk of the District Court. Hence, the need to rely on the appendix.

* * *

"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)."

* * *

III.

POINT INVOLVED ON THE MERITS

WHETHER UNDER THE LAW OF THE STATE OF FLORIDA THE FILING OF A NOTICE OF APPEAL SHOULD CONSTITUTE AN ABANDONMENT OF THEN-PENDING RULE AUTHORIZED POST JUDGMENT MOTION WHICH ABANDONMENT IMMEDIATELY CONFERS SOLE JURISDICTION OVER THE CAUSE TO THE APPELLATE COURT THEREBY DEPRIVING THE TRIAL COURT OF JURISDICTION TO CONSIDER THE POST TRIAL MOTION.

IV.

SUMMARY OF ARGUMENT

GONZALEZ contends:

1. Albeit dicta, the so-called "limbo jurisdiction" doctrine expressed and adopted by this Court in WILLIAMS v. STATE, 324 So. 2d 74 (Fla. 1975) should be the law of the State of Florida.

2. WILLIAMS and the decisions of the District Courts of Appeal, First and Fourth Districts, which follow its dictates are the better reasoned cases.

3. The limbo jurisdiction doctrine protects the client, trial counsel inexperienced in the ins and outs of appellate practice and even experienced appellate counsel from yet another intolerable legal trap for the unwary.

4. Adoption of the "abandonment doctrine" for which the decision sought to be reviewed stands would create yet another intolerable legal trap for the unwary.

5. The arguments advanced by the District Court in the decision sought to be reviewed must be rejected as invalid, insufficient to justify adoption of the abandonment rule as the law of the State of Florida and constituting an

inappropriate elevation of dangerous technicality over far more humane form and substance.

V.

ARGUMENT

UNDER THE LAW OF THE STATE OF FLORIDA THE FILING OF A NOTICE OF APPEAL SHOULD NOT CONSTITUTE AN ABANDONMENT OF THEN-PENDING RULE AUTHORIZED POST JUDGMENT MOTION WHICH ABANDONMENT IMMEDIATELY CONFERS SOLE JURISDICTION OVER THE CAUSE TO THE APPELLATE COURT THEREBY DEPRIVING THE TRIAL COURT OF JURISDICTION TO CONSIDER THE POST TRIAL MOTION.

In WILLIAMS, supra, this Court held that a notice of appeal filed by a criminal defendant after judgment and sentence were reduced to writing, but before those documents were filed in the clerk's office and the judgment and sentence rendered, "shall exist in a state of limbo until the judgment is rendered." Upon rendition of judgment, the notice of appeal becomes efficacious to confer jurisdiction on the appellate court. If this were all the Court said, the case would stand only for the rather unremarkable proposition that a man's freedom to bail while appealing his conviction should not depend on the fortuity of when papers happen to be filed in the clerk's office. However, a unanimous Court went on to hold that a notice of appeal that is prematurely filed shall (1) not be dismissed and (2) shall exist in a state of limbo until the respective civil or criminal case judgment is rendered.* In WILLIAMS this Court specifically noted, at 77, that a "liberal interpretation . . . is to be accorded proce-

* "Rendered" in a context such as that involved here would mean upon denial of a timely and proper post trial motion. See Florida Appellate Rule 9.020(g).

dural rules." This Court, inter alia, stated:

* * *

> "Leaving aside the question of obtaining supersedeas bond, we also hold that a notice of appeal which is prematurely filed shall not be subject to dismissal. Rather, such a notice of appeal shall exist in a state of limbo until the judgment in the respective civil or criminal case is rendered. At the time of rendition, the notice of appeal shall mature and shall vest jurisdiction in the appellate court.
>
> "Thus, a notice of appeal which is filed after the oral pronouncement of judgment and/or sentence, but before rendition thereof, is not to be dismissed on the grounds that it is premature. This rule shall apply to such situations as when the defendant filed his notice of appeal:
>
> "1. After oral pronouncement of judgment, but before the judgment is reduced to writing and signed.
>
> "2. After the written judgment is signed, but before it is rendered (filed for recording).
>
> "3. After the written judgment is filed for recording, but before a post-trial motion is decided.
>
> "This list is not to be considered as delineating the only situations in which this ruling applies. Others may arise in future cases. Thus, cases such as Holmes v. State, 267 So. 2d 344 (Fla. App. 4th 1972), which held that a notice of appeal must be dismissed if filed prematurely, are expressly overruled.
>
> "Apart from these judgments, decrees, decisions and orders which are required to be recorded, our holding as to the premature filing of a notice of appeal is also to apply in these cases where the judgment, decree, decision or order is not required to be recorded. As to these, Florida Appellate Rule 1.3 only requires that it be 'filed with the clerk' as opposed to 'filed for recording.'"

* * *

It must be emphasized that this Court said it was making a holding and not expressing dicta.

The District Courts of Appeal, First and Fourth Districts, have had no problem at all with the fairness or propriety of this Court's holding in WILLIAMS. See--LEOPARD v.

STATE, 489 So. 2d 859 (Fla. 1 DCA 1986); LLOYD v. HARRISON, 489 So. 2d 856 (Fla. 1 DCA 1986); IN THE INTEREST OF R.N.G.C.A.G. and S.E.G., 496 So. 2d 988 (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). Indeed, the Third District Court of Appeal is the only Florida appellate court which has had a problem with WILLIAMS.

For the reasons which follow the "limbo jurisdiction doctrine" is far more reasonable, fair and equitable than the "abandonment doctrine:"

1. This is not the best of all possible worlds. All lawyers, indeed, perhaps most lawyers including some "appellate specialists," simply are not familiar with the rules of civil and appellate procedure and the interplay between the two.

2. Most appeals are filed by trial lawyers and not appellate specialists.

3. Lawyers are not infallible. Any rule which creates a trap or pitfall for the unwary must be avoided. This is in keeping with the liberal effect to be given to procedural rules.

4. The "limbo jurisdiction doctrine" is most protective of client and counsel for example in situations where:

a. Counsel is in doubt about the propriety of his motion for new trial in an appellate "rendition" and "time tolling sense" and, in an abundance of appellate

caution, files a notice of appeal within 30 days of entry of an order or judgment while his motion is still pending;

b. Counsel does not wish to run afoul of the rule requiring post trial motion challenge to the sufficiency of the evidence to support a verdict in order to preserve that question for appeal. See F.R.C.P. 1.530(e);

c. Counsel seeks to supplement a showing post grant of motion for summary judgment;

d. A newly retained "appellate specialist" is retained at the last minute and not informed of the pendency of a post trial motion.

e. A not so newly retained "appellate specialist" is--through inadvertence or otherwise--not served with a copy of a timely filed and proper post trial motion.

In all of the foregoing examples client and counsel would be protected by the "limbo jurisdiction doctrine" and could be destroyed by the "abandonment doctrine."

For the reasons which follow, the reasons given by the District Court of Appeal, Third District, for refusing to follow this Court's holding in WILLIAMS and for adoption of the "abandonment doctrine" are without merit:

1. In WILLIAMS this Court expressly stated that what it had to say regarding "limbo jurisdiction" was "holding" and not, as the District Court would have it, "complete dictum, totalling unnecessary and in fact irrelevant to the

disposition" of the issue involved.

2. It is not at all "simply impossible to believe" that this Court did know what it was doing or intended to do in WILLIAMS. This Court knew exactly what it was doing and unanimous in "holding" as it did.

3. There will be no chaos if the "abandonment doctrine" is rejected by this Court. The legal world will not end.

4. Adoption of the "abandonment doctrine" would create yet another legal trap for the unwary and constitute an elevation of dangerous technicality over humane form and substance.

VI.

CONCLUSION

It is respectfully submitted that for the reasons stated herein, the decision sought to be reviewed should be quashed and this Court should in no uncertain terms reiterate and re-emphasize its "holding" in WILLIAMS.

Respectfully submitted,

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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 28 day of May, 1991.

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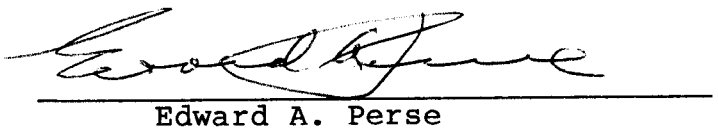

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