O.A. 10-4-91

047

SUPREME COURT OF FLORIDA

CASE NO. 77,492

DISTRICT COURT OF APPEAL,
THIRD DISTRICT Case No. 90-1822

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

LAZARO RUBEN GONZALEZ,

Petitioner,

vs.

METRO DADE POLICE DEPARTMENT,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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I.

INTRODUCTION

Respondent here, (Metro-Dade Police Department) was Petitioner at the trial level and Appellee in the Third District Court of Appeal.

Respondent accepts Petitioner's "Statement of Case and Facts" and "Point Involved on the Merits."

II.

ISSUE BEFORE THE COURT

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

III.

SUMMARY OF ARGUMENT

Respondent was awarded a Final Judgment by the Trial Court based on a Motion for Summary Judgment. Petitioner timely filed a Motion for Rehearing. Before that motion could be heard Petitioner filed a Notice of Appeal thereby abandoning his Motion for Rehearing and electing to proceed by way of appeal.

It is Petitioner's position that Williams v. State, 324 So.2d 74, 79 (Fla. 1975) holds that the filing of Notice of Appeal does not abandon post-trial motions and they are heard while the appeal resides in "limbo."

This Court, in its dictum in Williams, supra, spoke primarily to the prohibition of the dismissal of an appeal filed while a post-trial motion was pending.

While Williams, explicitly overruled some cases it did not overrule a long line of cases ending with State ex rel. Faircloth v. District Court of Appeal, Third District, 187 So.2d 890 (Fla. 1966).

The Third and Fourth District Courts of Appeal in Winn Dixie Stores Inc. v. Codomo, 372 So.2d 952 (Fla. 3d DCA 1979) and the Fourth in Bianco v. Bianco, 383 So.2d 1120 (Fla. 4th DCA 1980), respectively, correctly read Williams as being intended to prevent the dismissal of appeals as premature where all post-trial motions had not been disposed of. These cases treated the

filing of a notice of appeal as abandonment of the post-trial motion (in harmony with Faircloth, supra) and used the day of filing of the notice of appeal as the date of rendition for purposes of appeal.

The Fourth DCA subsequently, (without stating its rationale), in a fact intensive case subscribed to Petitioner's interpretation of Williams, supra. Sloman v. Florida Power and Light, 382 So.2d 834 (Fla. 4th DCA 1980). The First DCA reluctantly followed case view but in three separate cases certified questions to this Court concerning the management of cases where dual jurisdiction (trial and appellate) created management problems.

Respondent urges the view of the Third, Second, Fifth and, from their expressed concern, the First District Courts of Appeal that a case be in the exclusive jurisdiction of only one court at any given time.

IV.

ARGUMENT

Respondent considers the decision of Judge Schwartz from which this appeal is taken an excellent brief on the subject and would not presume to add or detract from it.

This Honorable Court in Williams v. State, 324 So.2d 74 (Fla 1975), overruled Woolley v. State, 193 So.2d 706 (Fla. 2d DCA 1966) and Clark v. State, 191 So.2d 870 (Fla. 2d DCA 1966), and modified City of Gainesville v. Thomas, 229 So.2d 833 (Fla. 1969), which concerned the filing of the notice of appeal and fee as effecting jurisdiction.

This Court in Williams did not overrule State ex rel. Faircloth v. District Court of Appeal, Third Dist., 187 So.2d 890, (Fla. 1966); State ex rel. Owens v. Pearson, 156 So.2d 4 (Fla. 1963); State v. Florida State Turnpike Auth., 134 So.2d 12 (Fla. 1961); or Allen v. Town of Largo, 39 So.2d 549 (Fla. 1949), which held that filing a notice of appeal serves to abandon pending post trial motions.

In overruling or modifying certain cases but allowing others to stand it is apparent this court did not intend to change the procedure set forth in Faircloth et al.

Faircloth et al. fully support Judge Schwartz's position and remain controlling. As will be seen they also fulfill the need for the orderly administration of justice and

are in keeping with the views of the First, Second, Third, Fifth, and arguably the Fourth District Courts of Appeal.

Judge Schwartz's opinion is in apparent conflict with three decisions from the First DCA and two from the Fourth DCA which have been cited by Petitioner. Petitioner then states at page 6, "The District Courts of Appeal First and Fourth Districts have had no problem at all with the fairness or propriety of . . . Williams" and then cites among others Park v. Bayview Village Condominium Ass'n., 468 So.2d 1116 (Fla. 4th DCA 1985); Lloyd v. Harrison, 489 So.2d 856 (Fla. 1st DCA 1986); Leopard v. State, 489 So.2d 859 (Fla. 1st DCA 1986); and In the Interest of R.N.G.,C.A.G. and S.E.G., 496 So.2d 988 (Fla. 1st DCA 1986).

While Petitioner may think the First and Fourth District Courts of Appeal "have had no problem," the cases seem to suggest otherwise. The First DCA in Leopard, supra, In the Interest of R.N.G. supra, and Lloyd, supra, certified many questions to this Honorable Court. It would appear that this was done because the Appellate Court did have problems.

Certainly the third question certified to the Supreme Court from the above cases goes to the heart of the problem that Petitioner blithely says the First DCA is not experiencing: "If the Williams rule would apply in such situations (notice of appeal does not act to abandon post-trial motion) are the appellate courts required to search the record in each case for evidence that such a post-trial motion has been filed and has not been ruled upon?"

Question four as certified goes to the duty of parties to inform the court of undecided post-trial motions.

Question five as certified asks if there can be a time limit to the "limbo."

Question six as certified asks that if the appellate court cannot impose a time limit on the "limbo" period, what procedure should be used to control files until the appeal matures.

Question seven as certified asks what procedure should be used if the file contains a post-trial motion that appears untimely.

Respondent respectfully suggests that the First DCA, by posing seven questions, in three decisions indicates they are having problems with Williams.

Of interest is Florida Star v. B.J.F., 499 So.2d 883 (Fla. 1st DCA 1986) in which the Court seized on a simultaneous filing of a post-trial motion and a notice of appeal as sufficient to escape their previous reading of Williams and held that the appellant abandoned his post-trial motion with the filing of the notice of appeal.

Petitioner, on page 7 of his brief states, "Indeed the Third District Court of Appeal is the only Florida appellate court which has had a problem with Williams." This statement may literally be true if Petitioner means by this that the Second and Fifth DCA agree with the Third DCA that Williams does not alter

the holding in Faircloth, supra, Owens, supra, Florida State Turnpike Authority, supra, and Allen v. Town of Largo, supra.

The Second District Court of Appeal in Jackson v. State, 570 So.2d 1038 (Fla. 2d DCA 1990) held "Assuming Jackson filed his notice of appeal before the trial Court ruled on his motion for rehearing, he is deemed to have abandoned that motion." See also Griffith v. State, 435 So.2d 398 (Fla. 2d DCA 1983).

The Fifth DCA in Brumlik v. Catalyst Inc., 463 So.2d 240 (Fla. 5th DCA 1984), stated, "[W]e agree that the filing of a notice of appeal prior to the determination of an otherwise timely filed motion for rehearing constitutes an abandonment of the motion for rehearing . . . "

Clearly, then, the Third DCA is not alone in distinguishing Williams from Faircloth et al., and the Second and Fifth DCA concur.

In his Summary, page 4, Petitioner states that the cases in the First and Fourth which follow his (Petitioner's) interpretation of Williams are "better reasoned cases" than those in the Third.

Respondent suggests that there is little "reasoning" in the decisions of the cases that follow Petitioner's theory of Williams. They merely state that Williams requires their holding as they do. The cases in the First DCA similarly follow Petitioner's interpretation of Williams, but question its wisdom.

The only cases that are "reasoned" are those of the Third DCA that distinguish Williams, and an earlier case in the

Fourth DCA. Winn Dixie Stores v. Codomo, 372 So.2d 952 (Fla. 3d DCA 1979); SAC Const. Co. v. Eagle National Bank, 449 So.2d 301 (Fla. 3d DCA 1984); In re One 1979 Chevrolet Blazer, 436 So.2d 1087 (Fla. 3d DCA 1983); Ferrara v. Belcher Industries Inc., 483 So.2d 477 (Fla. 3d DCA 1986).

Both the Third and Fourth DCA (before the Fourth subscribed to Petitioner's view of Williams), addressed the issue of Williams. Bianco v. Bianco, 383 So.2d 1120 (Fla. 4th DCA 1980), and Winn Dixie Stores, supra. Both districts treated Williams dicta as standing for the proposition that an appeal should not be dismissed as premature only because unresolved post-trial motions were before the trial court thus displaying a lack of finality of judgment.

These districts utilized the line of cases ending in Faircloth, supra, as authority for the proposition that the filing of the notice of appeal abandoned the post-trial motion and finality of judgment therefore occurred on such filing.

This orderly process was followed until Sloman v. Florida Power and Light, 382 So.2d 834 (Fla. 4th DCA 1980). Here the court abandoned (without comment) the rationale of Bianco supra, in a case that appears to have been properly decided on the basis of efficient use of court and counsels' time. The judgment appealed from did not have the attributes of finality, merely stating that "The . . . Motion for Summary Judgment is granted." The Court held the appeal in "limbo" to allow for the entry of a final judgment.

From this unusual fact situation sprang the other Fourth and First DCA opinions. These cases appear to all be based on this one case in the Fourth DCA which did not involve a post-trial motion.

Petitioner's "reasoning" in his brief is from the point of view of the "calamity" that would befall the unwary lawyer if Petitioner's interpretation of Williams were not followed.

Begging the Court's and Petitioner's pardon for this overly blunt statement, but this is a "cry baby" argument. Are the courts to surrender their orderly process to accommodate careless or incompetent counsel? Perhaps adherence to strict standards will serve to raise the caliber of our profession. An attitude of permissiveness will serve only to perpetuate the lazy advocate.

Our concern should focus on the orderly progress of cases in our courts. My poor powers cannot improve on the seven questions propounded by the First District Court of Appeal which graphically describe the administrative difficulties Petitioner's position would inflict on the Appellate Courts.

Both the courts and parties must know where jurisdiction lies. The Third, Fifth and Second District Courts of Appeal by following Faircloth know where jurisdiction lies. The Fourth and First do not, although the First would obviously prefer to follow Faircloth.