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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOSEPH F. CAPUZZO,  
Appellant,

v.

Case No. 78,379

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_ /

ON DISCRETIONARY REVIEW FROM THE  
DISTRICT COURT OF APPEAL,  
FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

✓ BELLE B. TURNER  
ASSISTANT ATTORNEY GENERAL  
210 N. Palmetto Avenue  
Suite 447  
Daytona Beach, FL 32114  
(904) 238-4990

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The District Court of Appeals, Fifth District, stated the facts of this case as follows:

Capuzzo, accompanied by his defense attorney, piloted an aircraft to Orlando to attend a sentencing hearing based upon an earlier plea of nolo contendere. He proceeded from the airport to the Orange County Courthouse where his attorney learned that the state intended to oppose his request for a continuation of the sentencing hearing. Upon learning of the opposition, Capuzzo left the courthouse, returned to the airport, and departed in the aircraft. The trial judge sentenced Capuzzo in absentia to a 15-year mandatory minimum prison term for trafficking in cocaine.

Capuzzo v. State, 578 So.2d 328 (Fla. 5th DCA 1991).

This decision was rendered on March 28, 1991. On April 12, 1991, counsel for petitioner filed a Motion for Rehearing En Banc, without an accompanying Motion for Rehearing. The state responded. The motion was denied by order dated May 2, 1991. Notice to Invoke the Discretionary Jurisdiction of this Court was filed on August 5, 1991, one hundred twenty-nine days after the decision and ninety five days after the order denying rehearing en banc.

SUMMARY OF ARGUMENT

A motion for rehearing en banc, without an accompanying motion for rehearing, is a nullity which does not toll the time for filing the notice to invoke this Court's jurisdiction. Even if it did, the Notice to Invoke was filed over two months after the time for filing expired. This is an irreparable jurisdictional defect.

Even if this Court reaches the merits despite the lack of jurisdiction, petitioner is unentitled to relief. There is no question that petitioner voluntarily and knowingly absented himself from the sentencing proceedings. Although sentencing is a critical stage of the proceedings, the defendant may waive his presence at sentencing if such a waiver is voluntary and knowing. No error is presented in this case where the mandatory minimum sentence was imposed after the defendant literally took flight.

ARGUMENT

THIS COURT IS WITHOUT JURISDICTION  
TO CONSIDER THIS CASE. EVEN IF  
THIS COURT REACHES THE MERITS, A  
DEFENDANT WHO VOLUNTARILY ABSENTS  
HIMSELF FROM SENTENCING AND WHO  
RECEIVES A MANDATORY MINIMUM  
SENTENCE HAS SUFFERED NO  
DEPRIVATION OF HIS RIGHTS.

Contemporaneously with this brief, respondent filed a motion to dismiss this case for lack of jurisdiction. Briefly summarized, the notice to invoke was untimely for two reasons: first, the Motion for Rehearing En Banc filed separately did not toll the time for filing the notice to invoke. State v. Kilpatrick, 420 So.2d 868 (Fla. 1982). Therefore, the notice to invoke was filed one hundred twenty-nine days after the court's decision. Second, even if the "nullity" of a separately filed Motion for Rehearing En Banc did toll the time, the failure to file the Notice to Invoke for ninety-five days is an irreparable jurisdictional defect. Jurisdiction cannot be conferred by consent of the court or the parties. This court forever lost jurisdiction on June 3, 1991. The Notice to Invoke was not filed until August 5, and is therefore untimely by more than two months. Respondent incorporates by reference herein the argument and authority presented in the Motion to Dismiss.

Should this honorable Court reach the merits despite the lack of jurisdiction, petitioner is unentitled to relief. The undisputed facts are that petitioner, a pilot, appeared with his attorney for sentencing at the Orange County Courthouse. When it became apparent that he would not be granted another continuance, he immediately departed, went to the airport, jumped into his

awaiting airplane and flew away. Petitioner does not contend that he did not voluntarily leave the sentencing hearing; nor does he suggest that he was unaware that these proceedings would take place. The trial court found as fact that petitioner voluntarily absented himself from the sentencing proceeding, and sentenced him in absentia to the mandatory minimum term for the crime for which he was convicted: fifteen years for trafficking in cocaine.

The sole issue before this court is whether a criminal defendant can voluntarily waive his presence at sentencing. Petitioner suggests that a waiver of the right to be present at sentencing can only be valid when the defendant expressly files an affidavit or waives the right in open court. He does not explain how someone who has voluntarily fled can be in open court at the same time to accomplish such a waiver, or how such an absent person can execute an affidavit. Nor does he explain how a person such as himself who receives a mandatory minimum sentence is prejudiced by not being present at sentencing. §924.33 Fla. Stat. (1989). Rather, he contends that he has a fundamental right to be present at sentencing, which can paralyze the court should he successfully flee the jurisdiction.

This court has held that the waiver of a defendant's presence at sentencing must be knowing, intelligent and voluntary. Turner v. State, 530 So.2d 45 (Fla. 1987). The voluntary absence of the defendant from the proceedings will not invalidate proceedings conducted in his absence. State v. Melendez, 244 So.2d 137 (Fla. 1971); Peede v. State, 474 So.2d

808 (Fla. 1985). Even in capital cases, a defendant may voluntarily waive his presence at a critical stage of the proceedings such as sentencing. Amazon v. State, 487 So.2d 8 (Fla. 1986); Robinson v. State, 520 So.2d 1 (Fla. 1988).

Petitioner's reliance on Florida Rule of Criminal Procedure 3.180(a)(9) is undermined by subsection (b) of the rule. Although (a)(9) lists the imposition of sentence as a stage of the proceedings which the defendant shall be present, subsection (b) limits the application of the rule to proceedings which occur prior to verdict. This rule is inapplicable to criminal defendants who voluntarily absent themselves without leave of the court after verdict but before sentence is imposed. Capuzzo v. State, 578 So.2d at 329.

The second and fourth districts have held that a criminal defendant cannot voluntarily waive his presence at sentencing. Quarterman v. State, 506 So.2d 50 (Fla. 2d DCA 1987), approved on other grounds, 527 So.2d 1380 (Fla. 1988); Wagner v. State, 519 So.2d 751 (Fla. 4th DCA 1988), but see, Roseman v. State, 497 So.2d 986 (Fla. 5th DCA 1986). The decision below cast doubt on the Quarterman decision by noting that an earlier second district case implied that the right to be present at sentencing can be waived. See, Walker v. State, 284 So.2d 415 (Fla. 2d DCA 1972).

Other jurisdictions hold that a defendant who voluntarily absents himself from sentencing can be sentenced in absentia. Golden v. Newsome, 755 F.2d 1478 (11th Cir. 1985); People v. Castro, 114 Ill.App.3d 984, 70 Ill.Dec. 539, 449 N.E.2d 886 (1983); People v. Davis, 106 A.D.2d 657, 483 N.Y.S.2d 119 (1984).



"These cases demonstrate that although sentencing is a critical stage of the prosecution, it is no more critical than the trial stage. Rule 3.180 explicitly provides that a defendant may waive his presence at trial by voluntarily absenting himself. It follows, then, that a defendant may also waive his presence at sentencing by voluntarily absenting himself." Capuzzo v. State, 578 So.2d at 330.

Should this honorable Court reach the merits of this case despite lack of jurisdiction, respondent respectfully requests the Court to affirm the decision of the district court below in all respects.

CONCLUSION

Based upon the argument and authority presented, respondent respectfully requests this honorable court to affirm the judgment and sentence in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

*Belle B. Turner*

BELLE B. TURNER  
ASSISTANT ATTORNEY GENERAL  
FLORIDA BAR NO. 397024  
210 N. Palmetto Avenue  
Suite 447  
Daytona Beach, FL 32114  
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief on the merits has been furnished, by Certified U.S. MAIL to Mitchell T. McRae counsel for petitioner at One Boca Place, Suite 405 East, 2255 Glades Road, Boca Raton, FL 33431, this 21st day of October, 1991.

*Belle B. Turner*

BELLE B. TURNER  
ASSISTANT ATTORNEY GENERAL