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IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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DERRICK ACKERS,

Petitioner,

v. **CASE NO.** 80,037

STATE **OF FLORIDA,**

Respondent,

ON DISCRETIONARY REVIEW FROM **THE DISTRICT COURT OF APPEAL**

FIFTH **DISTRICT**

RESPONDENT'S MERITS BRIEF

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AUTHORITIES CITED

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The state agrees with the Restatement of the Case and Facts as set out by the Petitioner in his brief on the merits, with the following additions:

The petitioner, Derrick Ackers, was convicted on March 8, 1991, in case no. CR90-9660 (Orange County), of two counts of robbery with a firearm and one count of aggravated battery. (R 388-9) That trial arose out of a robbery of a Kentucky Fried Chicken restaurant ("KFC") which took place shortly after midnight on Saturday morning, August 18, 1990. (R 452-3, 120-1, 13102) The evidence at the trial of that case showed that three black men, including Mr. Ackers, with their faces wrapped in plastic bags, accosted two KFC employees as they were leaving the closed store around 12:30 in the morning. (R 120-2, 131-5, 148) One of the men had a broomstick; at least one had a gun, State v. Ackers, 599 So.2d 222 (Fla. 5th DCA 1992). (R 121, 130, 134-5) The armed men forced the employees back into the store and onto the floor, and stole $4800. Ackers at 224. (R 122-3, 135-6) Shots were fired into the air, and at least one bullet was fired into a wall, during the robbery. (R 124, 125, 136, 137) A confidential informant connected Mr. Ackers and a dark Mercury Cougar to the KFC robbery. Ackers at 224. (R 412)[1] The KFC faces North Orange Blossom Trail in Orlando. Id. (R 412)

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[1] The trial court, in ruling on the motion in limine that was the subject of the state's appeal in this case, accepted the facts as set out in the sworn arrest affidavit that appears in the record on appeal at pages 412-5. (R 455)

Mr. Ackers was charged in case no. CR90-10093 (Orange County) (this case) with a second armed robbery. (R 409) The trial judge, the Honorable Gary L. Formet, Sr., Circuit Judge, excluded all evidence of the KFC robbery from the second trial. (R 4553 The second armed robbery took place at a Popeye's Fried Chicken restaurant located on North Orange Blossom Trail. in Orlando. Ackers at 223. (R 412) The Popeye's robbery took place exactly two weeks after the KFC robbery, between midnight and 12:30 Saturday morning, September 1, 1990. Id. (R 412) Two black males accosted Popeye's employees as they took out the trash, ordered the employees back into the store, and stole $1900. (R 412) One of the men was armed with a gun, the other with a broomstick. (R 412) A shot was fired into the wall during the robbery. Id. at 223-4. (R 412) Witnesses outside reported that the robbers departed the scene in a dark Mercury Cougar. Id. (R 412)

One bullet was extracted from the wall of each restaurant. An FBLE analyst, Greg Rathman, reported that both bullets were "positively" fired from the same gun. See Ackers at 224. (R 415) Rathman also examined a gun seized from Darrick Studstill, Mr. Ackers's co-defendant in both case no. CR90-9660 and case no. CR90-10093. He reported that Mr. Studstill's gun fired both bullets. Id. (R 415)

The trial judge, before trial, entered an order excluding from the trial of the later Popeye's robbery "all evidence pertaining to" the earlier KFC robbery. (R 455)

SUMMARY OF ARGUMENT

The district court's decision and opinion should be approved. The order the state appealed from in this case was an appealable order within the meaning the appellate courts have given Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure. If this court disagrees, the district court's decision should still be approved, as the order appealed from departed from the essential requirements of law.

In addition, the state requests this court to adopt Justice Overton's concurring opinion in State v. Pettis, 520 So.2d 250 (Fla. 1988), and to consider amending the above-cited rule.

ARGUMENT

THE DISTRICT COURT CORRECTLY REVIEWED AND REVERSED THE TRIAL COURT'S ORDER EXCLUDING SIMILAR FACT EVIDENCE.

The petitioner, Derrick Ackers, argues that the district court's decision in this case is in conflict with this court's decisions in State v. Palmore, 495 So.2d 1170 (Fla. 1986) and in McPhadder v. State, 475 So.2d 1215 (Fla. 1985). His contention is that the district court misconstrued Rule 9.140(c)(1), Florida Rules of Appellate Procedure, and that the state's appeal to the district court in this case should have been dismissed. The state contends first, that the district court's decision to hear the state's appeal was correct; second, that even if the order appealed from was not an appealable order, the result reached by the district court should be approved, as the trial court's order departed from the essential requirements of law; and third, that Rule 9.140(c)(1)(b) should be amended, as in its present form it has fostered excessive appellate litigation,

Rule 9.140(c)(1)(b) provides[2] that the state, in criminal cases, may appeal nonfinal orders

> [s]uppressing before trial confessions, admissions or evidence obtained by search and seizure.

The state acknowledges that while the right of appeal from final judgments and orders is prescribed by statute, the review of nonfinal orders is governed by court rule. State v. Pettis, 520

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[2] The amendments to the Florida Rules of Appellate Procedure approved by this court on October 22, 1992 do not affect the substance of Rule 9.140. See In Re: Amendments to the Florida Rules of Appellate Procedure, 17 FLW 674 (Fla. October 22, 1992).

So.2d 250, 25% (Fla. 1988); State v. Creighton, 469 So.2d 735 (Fla. 1985); State v. Smith, 260 So.2d 489 (Fla. 1972); Art. V, §4(b)(1), Fla. Const. The order appealed from in this case was an appealable order within the meaning given to Rule 9.140 by the appellate courts of this state.

Judge Formet's order had the effect of excluding admissions made by Mr. Ackers and his ca-defendant, Mr. Studstill. (R 226-30, 235-6, 267-9)[3] Those admissions all involved the collateral KFC robbery. The judge's order also had the effect of excluding the testimony of the experts who could testify that the gun seized from Mr. Studstill was the same gun shot at both robberies. (R 157-62, 198-219)[4] Without that testimony, the state could tie the gun to Studstill but not to Ackers. With that testimony, the state could prove the highly relevant facts that Studstill's gun was involved in both robberies, that Ackers and Studstill were convicted of the first robbery, and that both robberies were greatly similar. The state submits that the District Court of Appeal correctly held that the evidence was relevant and not unfairly prejudicial. State v. Ackers, 599 So.2d 222 (Fla. 5th DCA 1992). See Amoros v. State, 531 So.2d 1256, 1259 (Fla. 1988) (use of gun in collateral incident essential to tie defendant to that case); Parker v. State, 456 So.2d 436, 443 (Fla. 1984) (weapon used in collateral incident relevant to tie defendant to that case); Hall v. State, 403 So.2d 1321 (Fla.

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[3] Those portions of the record are included in Appendix B to the Respondent's Jurisdictional Brief filed in this case.

[4] Also part of Appendix B to the Respondent's Jurisdictional Brief.

1981)(similar); Shriner v. State, 386 So.2d 525 (Fla. 1980) (similar). See also Rogers v. State, 511 So.2d 526 (Fla. 1987) (similarities in evidence of multiple robberies comparable to similarities in this case).

The order appealed from in this case was appealable pursuant to Rule 9.140(c)(1)(B). Orders excluding defendants' admissions and co-defendants' admissions are appealable, State v. Brea, 530 So.2d 924 (Fla. 1988) (co-defendants' admissians); State v. Palmore, 495 So.2d 1170 (Fla. 1986) (defendants' admissions); State v. Kleinfeld, 587 So.2d 592 (Fla. 4th DCA 1991) (hearsay incorporating defendant's admissions). The petitioner now argues, without citation, that admissions concerning collateral crimes should not be included among the admissions referred to in the Rule. The distinction is not, of caurse, made in the rule; the state submits that the distinction is not one that should determine when the people may seek reversal of a pretrial order. *See* State v. Everette, 532 So.2d 1124 (Fla. 3rd DCA 1988).

The order excluding evidence of the gun and the bullet fragments recovered from both robbery scenes was also appealable pursuant to 9.140(c)(1)(B). The gun and the bullet fragments were seized by the police; the experts' testimony was necessary to explain their relevance. See State v. Segura, 378 So.2d 1240 (Fla. 2d DCA 1970), approved in State v. Palmore, supra; see also State v. Kepke, 596 So.2d 715, 716 (Fla. 4th DCA 1992).

In the alternative, the state contends that if the order appealed from in this case was not an appealable order, the district court's decision should still be approved, as the order

was properly reviewable by certiorari. See State v. **Pettis**, 520 So.2d 250 (Fla. 1988) (non-appealable interlocutory **orders** reviewable by certiorari). The **order** appealed from in this case departed from the essential requirements of law. Amoros, supra; Rogers, supra. See State v. Wilson, 483 So.2d 23 (Fla. 2d **DCA** 1985), aff'd 520 So.2d 566 (Fla. 1988) (approving district court's order quashing, by certiorari, pretrial order excluding evidence on relevancy grounds). *See* also State v. Wells, 538 So.2d 1292 (Fla. 2d ***DCR*** 1989) (similar); State v. Maisto, 427 So.2d 1120 (Fla. 3rd DCA 1983) (similar).

The petitioner argues that if the contested order was not an appealable one, this court should not **approve** the district court's result since the state failed to show that its ability to prosecute was "**negated**" by the order. Petitioner seizes on language in State v. Pettis supra, in which this court noted that the people should have some avenue **for** review of "orders which effectively negate [the state's] ability to prosecute." 520 So.2d at **253**. This court went on to state that without some mechanism for review

> the state would not be able to correct an erroneous **and** highly prejudicial ruling. Under such circumstances, the state could only proceed to trial with its ability to present the case *significantly impaired.*

Pettis at 253 (emphasis added). In this case, the state represented to **Judge** Formet before trial that the evidence tying the robberies together was essential to the state's case in **the**

second trial.[5] The state submits that this representation, on the facts of this case, was sufficient to show material injury to the state's interests that could not be redressed by means other than review by the district court. *See* State v. Cecil, 533 So.2d 884 (Fla. 3rd DCA 1988) (record showed that order in limine significantly impaired state's ability ta prosecute); see also State v. Sorakrai, 543 So.2d 294, 296 (Hall, J., dissenting) (certiorari review should be limited to orders substantially impairing state's ability to prosecute).

The state further contends that Justice Overton, in his concurring opinion in State v. Pettis, supra, was correct and that this court should amend Rule 9.140(c)(1)(B). The list of appealable orders included in that rule originated with the 1967 Legislature and was adopted without revision by this court, *see* State v. Smith, 260 So.2d 489, 490 (Fla. 1972); the state submits that the list is arbitrary and has engendered unnecessary appellate litigation. See Pettis, supra, 520 So.2d at 254-6 (Overton, J., concurring in result only); id. at 256-9 (Shaw, J., dissenting).

A review of recent cases construing the rule illustrates the increasingly fine distinctions the courts have drawn in defining its scope. In McPhadder v. State, 475 So.2d 1215 (Fla. 1985) this court clearly held that an order excluding evidence that was not seized is not appealable. In State v. Palmore, 495 So.2d 1170 (Fla. 1986), this court approved State v. Segura, 378 So.2d 1240 (Fla. 2d DCA 1979), in which the panel held that an order

[5] Record on appeal at 406.

suppressing any testimony regarding seized evidence is appealable, In State v. Kepke, 596 So.2d 715 (Fla. 4th DCA 1992), the panel, citing Segura, assumed without deciding that an order excluding testimony offered as a predicate to explain seized evidence was appealable. In State v. Townsend, 479 So.2d 306 (Fla. 2d DCA 1985), the panel held that an order suppressing all testimony regarding "the taking of the appellee's blood and the subsequent [test] result." was something *other* than an order suppressing evidence obtained by search and seizure, and that it was accordingly not appealable, In State v. Eicher, 431 So.2d 1009, 1011 (Fla. 3rd DCA 1983) (on rehearing en banc), the court reversed a panel decision which had held that an order suppressing evidence tainted by a separate unlawful seizure was *not* appealable. In State v. Hancock, 584 So.2d 221 (Fla. 4th DCA 1991), the panel interpreted Palmore as allowing review of orders suppressing, on constitutional grounds only, evidence seized by police from defendants. Cf. State v. Katiba, 502 So.2d 1274 (Fla. 5th DCA 1987) (heated discussion by divided panel as to ramifications of McPhadder and Palmore.)

The state also respectfully submits that it *is* unreasonable for an evidentiary ruling in one case to be reviewed on the basis of an "abuse of discretion" standard and for a substantially similar ruling in another case to be reviewed on the basis of a "departure from the essential requirements of law" standard. The latter standard, as Justices Overton and Shaw have noted, was not intended for use on direct review, and it affords this court little control over interlocutory appeals. State v. Pettis, 520

So.2d at 254-6 (Overton, J., concurring in result only); id. at 256-9 (Shaw, J., dissenting). See also W. Haddad, The Common Law Writ of Certiorari in Florida, 29 U. Fla. L. Rev. 207, 220 (1977); W. Rogers and L. Baxter, Certiorari in Florida, 4 U. Fla. L. Rev. 477, 497-502 (1951).

The state acknowledges that the rule of Pettis, supra, permitting the state to seek certiorari review of non-appealable pretrial orders, alleviates in part the difficulties outlined above. However, the state submits that that alleviating factor does not sufficiently address the problems caused by the narrow and arbitrary scope of Rule 9.140(c)(1)(B). The district courts are burdened not only with the disproportionately vexed question whether to treat state appeals as certiorari petitions or as appeals, but also with the case-by-case decision whether they have jurisdiction to review questions certified by the county courts in criminal cases. Rule 9.030(b)(4)(B), Florida Rules of Appellate Procedure, gives the district courts "pass-through" jurisdiction to decide such questions *when they are otherwise appealable to the* circuit *courts.* Such certified questions are not uncommon in cases challenging breath and blood tests. E.g., State v. Kepke, 596 So.2d 715 (Fla. 4th DCA 1992); State v. Townsend, 479 So.2d *306* (Fla. 2d DCA 1985).

The state acknowledges the concern for excessive delay, expressed in all of the Pettis opinions, that could be engendered by untrammeled state appeals, but submits that alternatives to the present Rule could adequately respond to those concerns. A limited record and an abbreviated briefing schedule, like that

contemplated for original proceedings in Rule 9.100, Florida Rules of Appellate Procedure, would be of benefit to all parties to criminal cases. The **state** does *not* suggest that all pretrial rulings in criminal cases should be reviewable by certiorari or not at all, as the state **submits**, again respectfully, that the standard for review in certiorari **cases** is inappropriate for direct review. **Pettis**, supra, 520 So.2d at 254-6 (Overton, J., concurring specially); Haddad, supra; Rogers and Baxter, supra. The **state** does suggest that the limited **list** of pretrial rulings identified by the 1967 Legislature should be **amended** to include all pretrial rulings that significantly impair the state's ability to **prosecute. See** Section 924.07(1)(h), Florida **Statutes** (1991); Pettis, **supra**, 520 So.2d at 253; State v. Cecil, supra, *533* So.2d 884, **885 (Fla.** 3rd DCA **1988).**

The petitioner argues, in essence, that this court should **create a rule** distinguishing (a) orders suppressing admissions that directly support an inference of guilt of the crime charged from (h) orders suppressing admissions which, no matter how highly relevant, can be said to support only indirectly the same inference. The state submits that the distinction will merely add exponentially to the growing body of caselaw that attempts to define the scope of Rule 9.140, and that the district court's decision should instead be approved,

CONCLUSION

The respondent requests this court to approve the opinion of the district court; in the alternative, to approve the decision of the district court; and to consider amending Rule 9.140(c)(1)(B), Florida Rules of Appellate Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by hand to Anne Moorman Reeves, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 24th day of November, 1992.

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