IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,484

RAMON LOPEZ

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

ON PETITION TO INVOKE DISCRETIONARY REVIEW JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

LAW OFFICES OF MARK KING LEBAN, P.A.
2920 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 082987

and

ARTURO ALVAREZ, ESQUIRE
2151 S.W. LeJeune Road
Suite 310
Coral Gables, Florida 33134

BY: MARK KING LEBAN
Counsel for Petitioner

ARGUMENT

Respondent incorrectly asserts that because the Rules of Appellate Procedure do not expressly authorize a defendant to cross-appeal an order granting in part and denying in part a motion to suppress, the right does not exist. Respondent misreads the rules, as well as the function and purpose of a cross-appeal. Respondent also attempts (through a mistaken interpretation of the 1977 amendment to the appellate rules) to circumvent this Court's holding in State v. McKinney, 212 So.2d 761 (Fla. 1968), which specifically found a right to cross-appeal in circumstances identical to the instant case. Contrary to respondent's assertion, the amendments did not abrogate the right to cross-appeal and McKinney correctly remains precedent.

Respondent makes much of the rules governing the authorization of interlocutory appeals, but the fact remains that an interlocutory appeal is not a cross-appeal. The function of each procedure is distinct, as are the rules governing the two. Interlocutory appeals are "specifically authorized by the rules," 3 Fla.Jur.2d, Appellate Review §302, whereas the right to cross-appeal springs from the "filing of the initial notice of appeal [. . .Thus] the notice of cross-appeal is properly regarded as no more than a subsequent procedural step in the appellate process." Brickell Bay Club Condominium Association, Inc. v. Forte, 379 So.2d 1334, 1335 (Fla. 3d DCA 1980). Accord, Agrico Chemical Company v. Department of Environmental Regulation, 384 So.2d 163 (Fla. 2d DCA 1980). Clearly, a cross-appeal rides the coattails of the initial notice of appeal and "depends entirely on

the existence of an appeal" for its own existence. Ramos v. State, 469 So.2d 145, 147 (Fla. 3d DCA 1985), aff'd, 505 So.2d 418 (Fla. 1987).

Respondent is thus incorrect when it states that "the only cross-appeals that are permissible are those cross-appeals which can be maintained independently of the main appeal" (Answer Brief at 8). Such assertion completely misreads the purpose and function of a cross-appeal. Admittedly, there are instances where a cross-appeal can be appealed independently, and in such cases, the cross-appeal will survive the termination of the main appeal. But, as the Third District noted in Ramos, in most cases a cross-appeal depends for its existence entirely on the main appeal and cannot be brought independently. Such is the nature of the cross-appeal.

Respondent also relies on State v. Williams, 444 So.2d 434 (Fla. 3d DCA 1983), which stated in dicta that the 1977 amendments to the Rules of Appellate Procedure abrogated a defendant's right to cross-appeal an order granting in part a motion to suppress. The Williams court extensively reviewed State v. McInnes, 133 So.2d 581 (Fla. 1st DCA 1961) and McKinney, pre-rule amendment decisions which specifically found that a defendant does have a right to cross-appeal an order granting in part a motion to suppress. Williams involved the State's appeal of an order granting a defendant's motion for new trial and held that defendant's cross-appeal on other grounds was appropriate because the State's appeal was specifically authorized by Fla.R.App.P. 9.110(a)(3). It should be noted that Rule 9.110 governs "Appeal Proceedings to Review Final Orders of Lower Tribunals and Orders Granting New Trial in

Jury and Non-Jury Cases." Rule 9.110 does not govern interlocutory criminal orders, a point noted by the 1977 Amendment Committee Notes. Rule 9.140 specifically governs appeal proceedings in criminal cases; Rule 9.140(c)(1)(B) permits the state to appeal orders "suppressing before trial confessions, admissions, or evidence obtained by search and seizure[.]" Rule 9.140(c)(1) superseded former Rule of Appellate Procedure 6.3, which gave the State the right to appeal, pursuant to section 924.01, Florida Statutes (1968), an order to suppress. Rule 9.140 in no way altered this right or diminished or abrogated the right to cross-appeal. Thus, Rule 9.110 is irrelevant to the disposition of an interlocutory order which is specifically appealable by the State under Rule 9.140(c)(1)(B). Williams' dicta stating that a defendant cannot cross-appeal an order granting in part a motion to suppress is erroneous and should not be followed by this Court.

Respondent admits that the current rules are silent on the issue of a party's right to cross-appeal. The rules are silent, contrary to respondent's assertion otherwise, precisely because a cross-appeal is not jurisdictional, but rather rides the coattails of the initial notice filed by the main appeal. This rule accords with the district court opinions in State v. McAdams, 559 So.2d 601 (Fla. 5th DCA 1990), State v. Waterman, 613 So.2d 565 (Fla. 2d DCA 1993), State v. McInnes, 133 So.2d 581 (Fla. 1st DCA 1961), and this Court's holding in McKinney. The fact of the matter is that the 1977 amendments to the Rules of Appellate Procedure did not alter the right to cross-appeal. Clearly, McKinney was not overruled by rule revisions, but continues to be binding precedent.

Respondent's overly restrictive view of the right to cross-appeal contradicts the long standing policy of appellate review that "statutes and rules governing the right to appeal and the exercise thereof are to be liberally construed in the interests of manifest justice." 3 Fla.Jur.2d, Appellate Review §13. It also contravenes the rationale expressed in Rule 9.140(f), Fla.R.App.P., that the appellate "court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal [and i]n the interest of justice, the court may grant any relief to which any party is entitled."

CONCLUSION

Respondent has offered no legitimate reasons for departing from this Court's longstanding, valid ruling in State v. McKinney, 212 So.2d 761 (Fla. 1968). Based upon the above and foregoing arguments and policy, petitioner respectfully requests this Court to quash the decision of the Third District below, to approve the decisions of the Second and Fifth Districts, to disapprove the decisions of the Third and Fourth Districts, to amend the Florida Rules of Appellate Procedure as set forth in petitioner's Initial Brief on the Merits, and to remand this cause with directions that the Third District reinstate the petitioner's cross-appeal, and proceed accordingly.

Respectfully submitted,

LAW OFFICES OF MARK KING LEBAN, P.A.
200 South Biscayne Boulevard
Suite 2920
Miami, Florida 33131-5302
(305) 374-5500
Fla. Bar No. 147920

and

ARTURO ALVAREZ, ESQUIRE
2151 S.W. LeJeune Road
Suite 310
Coral Gables, Florida 33134

BY: Mark King Leban
MARK KING LEBAN
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Michael Neimand, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 921N, Miami, Florida 33128; Elizabeth White, Esquire, Sheppard & White, 215 N. Washington Street, Jacksonville, Florida 32202, Counsel for Amicus, Florida Association of Criminal Defense Lawyers (Statewide); Deborah Brueckheimer, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, Counsel for Amicus, Florida Public Defenders' Association; Elliot H. Scherker, Esquire, Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131, Counsel for Amicus, Florida Association of Criminal Defense Lawyers (Miami Chapter), this 7th day of January, 1994.

Mark King Leban