ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 86,956

STATE OF FLORIDA

Petitioner,

vs.

ROBERT LEE DOZIER,

Respondent.

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ON PETITION FOR CERTIORARI REVIEW

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PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Robert Lee Dozier, was the Defendant and Petitioner, the State of Florida, was the prosecution in the trial on criminal charges filed in the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Respondent, Dozier, was the Appellant, and Petitioner, the State of Florida, was the Appellee, in the appeal filed with District Court of Appeal, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to herein as "the State."

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Criminal charges were filed against Respondent under Indian River County Case No. 94-234-CF (R. 4-5). Judge Joe Wild, a county court judge, was the judge assigned to try Respondent's case, pursuant to an Administrative Order (R. 35). Respondent moved to disqualify Judge Wild from presiding over his trial, alleging that Judge Wild was without jurisdiction over his case because he had become "a *de facto* circuit judge" (R. 32-34). Judge Wild denied Respondent's motion to disqualify (R. 38-39).

Respondent filed a Petition for Writ of Prohibition in the District Court of Appeal, Fourth District, alleging that due to the continuous appointments of Judge Wild to handle half of the Indian River County felony case load, Judge Wild had become a *de facto* circuit judge; that as a *de facto* circuit judge in violation of the Florida Constitution, Judge Wild was without "authority" to conduct felony trials in Indian River County; and that, as such, Judge Wild should be prevented from presiding over Respondent's trial to prevent a miscarriage of justice (A. "A"). The Fourth District denied Respondent's petition, with the following citation: "See Wallace v. State, 609 So. 2d 64 (Fla. 4th DCA 1992)" (A. "B").

After jury trial, Respondent was adjudicated guilty as charged (R. 57, 72-73). Respondent appealed from his conviction to the

Fourth District (R. 88). In his first point on appeal, Respondent alleged that Judge Wild lacked jurisdiction to preside over his felony prosecution because his assignment as a circuit court judge was not temporary (A. "C"). Respondent pointed out that, "Judge Wild entered an Order denying the motion to disqualify (R. 38-39) which is virtually identical to that entered by Judge Wild and invalidated by this Court sitting en banc in Dozier v. Honorable Joe A. Wild (Case No. 94-1104, __ So. 2d __ (Fla. 4th DCA En Banc Opinion filed September 29, 1994)" (A. "C" p. 8).

Notwithstanding Petitioner's arguments against reversal, primarily based on law of the case (A. "D"), the Fourth District reversed Respondent's conviction based on this point alone (A. "E").[1] It held:

> In another appeal involving a different conviction of this very same defendant, we reversed his conviction on the ground that it was unconstitutional for a county court judge to be repeatedly assigned to hear criminal cases over which only a circuit judge has jurisdiction, and we certified the issue as one of great public importance. Dozier v. Wild, 659 So. 2d 1103 (Fla. 4th DCA 1995). Because Dozier's conviction in this case is indistinguishable on the constitutional issue, his motion to disqualify Judge Wild should

[1] The Fourth District addressed the other two points raised by Respondent on appeal, and determined that they did not warrant reversal.

> have been granted. We therefore reverse his conviction, but since we are mindful that our Supreme Court may disagree, we address Dozier's other arguments.

(A. "E").

After Petitioner's motion for rehearing in the district court was denied, it filed a timely notice to invoke the discretionary jurisdiction of this court based on Jollie v. State, 405 So. 2d 418 (Fla. 1981)because Wild v. Dozier, Case No. 85,050 was then pending before this court. On February 13, 1996, this court entered an order accepting jurisdiction and setting out a briefing schedule. Petitioner's Brief on the Merits timely follows.

SUMMARY OF THE ARGUMENT

The Fourth District erred in holding unconstitutional the administrative order by the chief judge for the Nineteenth Judicial Circuit, dated September 28, 1993, which permitted Judge Wild to sit on the instant case. This court's recent decision in The Honorable Joe A. Wild v. Dozier, 21 Fla. L. Weekly S57 (Fla. Feb. 8, 1996) makes clear that the Fourth District neither had the authority to review the order, nor correctly determined that it was invalid. Rather, as this court determined in Wild, the order constituted a valid "temporary assignment," so that Judge Wild had jurisdiction to hear this case.

Even if this court had not upheld the order in Wild, the Fourth District erred in reversing Respondent's conviction. Respondent did not show that the trial court was biased or impartial in any way. Hence, the conviction, which was entered with the color of authority, should not have been voided, but should have been deemed valid.

Since the Fourth District explicitly found no reversible error outside of the jurisdictional issue, this court should reinstate the conviction and sentence.

POINT I

THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN HOLDING UNCONSTITUTIONAL THE ADMINISTRATIVE ORDER OF SEPTEMBER 28, 1993, WHICH WAS ISSUED BY THE CHIEF JUDGE PURSUANT TO SECTION 2(b)(d), ARTICLE V OF THE FLORIDA CONSTITUTION AND RULE 2.050 (b)(3)(4), RULES OF JUDICIAL ADMINISTRATION.

In The Honorable Joe A. Wild v. Dozier, 21 Fla. L. Weekly S57 (Fla. Feb. 8, 1996), this court held that it has exclusive jurisdiction, pursuant to Article V, Section 2(a) of the Florida Constitution, to review challenges to judicial assignments. It stated, "Accordingly, we hold that a litigant who is affected by a judicial assignment made by a chief judge of a judicial circuit must challenge the assignment in the trial court and then seek review in this Court by way of a petition for writ of prohibition or petition for relief under the 'all writs' power." 21 Fla. L. Weekly at S57. This Court explained, "This grant of exclusive authority ensures this Court's plenary control over the state's court system and avoids the disruptive effect allowing district courts to quash judicial assignments would have on that system." Id.

Since this Court was the only proper forum for Respondent to challenge the denial of his motion for disqualification, then, the

Fourth District had no authority to hold invalid the administrative order allowing Judge Wild to sit as a circuit court judge. Indeed, this Court specifically noted in Wild that there is nothing in the Constitution to indicate that district courts are to share in the administrative supervision of the trial courts. Id.

This Court also concluded in Wild that the **exact same** judicial assignments in question here were permissible. This Court explained that the assignments were "temporary," as contemplated by Fla. R. Jud. Admin. 2.050 (b)(4), for Judge Wild continued to do all of his county court work and received new assignments every six months to hear half of the criminal circuit court cases. Id. at S58. In addition, it reasoned:

> In multi-county circuits the county judges in the less populous counties are often underutilized, yet they are willing to do circuit judge work. In some instances there are no circuit judges resident within those counties. The most efficient use of scarce judicial resources dictates the assignment of county judges to handle limited aspects of circuit judge work in such counties, provided that the assignments do not interfere with the full performance of county judge duties.

Id.

Accordingly, the Fourth District erred in holding that Judge Wild did not have jurisdiction to sit on the instant case. See Wild, 21 Fla. L. Weekly at S58(Judge Wild has been sitting on felony cases

pursuant to valid orders, and, therefore, is not without jurisdiction to hear these cases).

The Fourth District's error in reversing the instant case is compounded by the fact that Respondent had already been tried and convicted. Whereas in Wild, the Fourth District granted the pretrial petition for writ of prohibition, in this case, the Fourth District had actually permitted the order to remain in effect for the trial. The Fourth District denied Respondent's petition for writ of prohibition, and then turned around on direct appeal from the final judgment and held unconstitutional the administrative order which was the subject of the pretrial petition.[2]

The State submits, as it did below, that even if the trial court had acted only in the *de facto* capacity alleged by

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[2] Indeed, Respondent sought interlocutory review of the trial court's refusal to recuse by way of a petition for writ of prohibition, which the Fourth District denied citing to Wallace v. State, 609 So. 2d 64 (Fla. 4th DCA 1992) (A. "B"). As an aside, therefore, the State contends, as it did below, that the reference to Wallace constituted a denial on the merits which served as law of the case. See Arp v. State, 547 So. 2d 212 (Fla. 4th DCA 1992). That is especially true since briefing on the petition for writ of prohibition was directed to the merits. See Reyes v. State, 554 So. 2d 625 (Fla. 3d DCA 1989); State v. Stanley, 399 So. 2d 371, 372 (Fla. 3d DCA 1981). In Barwick v. State, 660 So. 2d 685, 691 (Fla. 1995), this court noted that Judge Anstead's special concurrence in DeGennaro v. Janie Dean Chevrolet, Inc., 600 So. 2d 44 (Fla. 4th DCA 1992) recognized that a denial of a petition for writ of prohibition in the Fourth District should henceforth constitute a ruling on the merits unless otherwise indicated.

Respondent, the **judgment** entered against Respondent would not have been automatically void. Rather, it would have been merely voidable, since a *de facto* trial judge functions under color of authority. See Card. State, 497 So. 2d 1169, 1173 (Fla. 1987). Common sense dictates that "voidable" means that there is only a possibility of the judgment being voided upon a proper showing. See Dade County v. Transportes Aereos Nacionales, S.A., 298 So. 2d 570, 572 (Fla. 3d DCA), cert. denied, 305 So. 2d 206 (Fla. 1974)("voidable assessment" is one which has been made in good faith but is irregular or unfair, and the taxpayer must move in due time and must make a full and clear showing of right to appropriate relief). In the *de facto* judge situation, such a showing would require the challenging party to explain why the otherwise valid judgment and sentence should be invalidated.

Below, Respondent offered no basis for finding that the trial court was biased against him, or that it was impartial in regards to his case. Consistently, this court has stated that a *de facto* trial judge's acts are valid. See Stein v. Foster, 557 So. 2d 861, 862 (Fla. 1990); Card, 497 So. 2d at 1173-1174. And, many courts have determined that a *de facto* trial court has jurisdiction over all matters which it handled. See Card, 497 So. 2d at 1173-1174; State v. King, 426 SO. 2d 12, 14 (Fla. 1982); Willie v. State, 600

So. 2d 479, 481 (Fla. 1st DCA 1992); Kruckenberg v. State, 422 So. 2d 994, 996 (Fla. 5th DCA 1982); Grossman v. Selewacs, 417 So. 2d 728, 730 (Fla. 1982); In re Peterson, 364 So. 2d 98, 99 (Fla. 4th DCA 1977). See also Banker's Life and Casualty Co. v. Gaines Const. Co., 191 So. 2d 478, 479 (Fla. 3d DCA 1966).

Thus, notwithstanding this Court's decision in Wild, the Fourth District erred in voiding the judgment against Respondent. As the Fifth District in Kruckenberg, 422 So. 2d at 996 noted, subject only to substanative recusal, a litigant does not have a right to have any particular judge hear his case. Similarly, a litigant does not have a right not to have a particular judge hear his case.

In closing, Petitioner points out that the Fourth District reversed Respondent's conviction based solely on Judge Wild having presided over the instant case. The Fourth District held:

> In another appeal involving a different conviction of this very same defendant, we reversed his conviction on the ground that it was unconstitutional for a county court judge to be repeatedly assigned to hear criminal cases over which only a circuit judge has jurisdiction, and we certified the issue as one of great public importance. Dozier v. Wild, 659 So. 2d 1103 (Fla. 4th DCA 1995). Because Dozier's conviction in this case is indistinguishable on the constitutional issue, his motion to disqualify Judge Wild should have been granted. We therefore reverse his

> conviction, but since we are mindful that our Supreme Court may disagree, we address Dozier's other arguments.

(A. "E")(emphasis supplied).

It addressed the other two points raised by Respondent on appeal, and determined that they did not warrant reversal (A. "E"). Hence, rather than remand this case for further proceedings, this court should reinstate the conviction and sentence.

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** and the conviction and sentence be **REINSTATED**.

Respectfully submitted,

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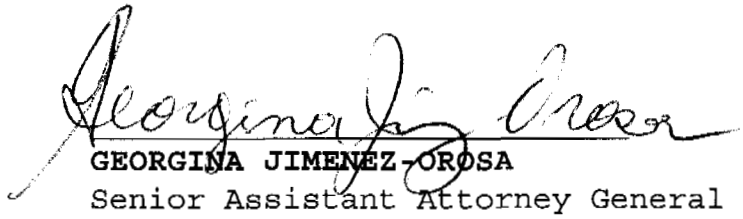

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: ELLEN MORRIS, Assistant Public Defender, Counsel for Respondent, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, this 28th day of February, 1996.

Of Counsel