IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Cross-Petitioner,
Respondent

v.

RICHARD K. BOYD,

Cross-Respondent,
Petitioner.

CASE NOS. 91-594; 91-556
Consolidated 10/30/97

CROSS-PETITIONER/RESPONDENT'S INITIAL BRIEF AND ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

LAURA FULLERTON LOPEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0093981

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext.. 4599

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Cross-Petitioner, the prosecution, or the State. Cross-Respondent, Richard K. Boyd, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of two consecutively paginated volumes. While the Index to the Record on Appeal, does not specify the volumes as 1 and 2, the volumes are designated volumes 1 of 2 and 2 of 2 on each cover. This brief will refer to a volume according to its respective designation on the cover, followed by the appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

With respect to the certified question at issue in this appeal, the State accepts Boyd's statement of the case and facts, but for clarity it provides the following:

FACTS OF THE CASE

The revocation hearing where Boyd first raised the issue of the trial court's jurisdiction, took place on June 7, 1996. (V2 90.) At that hearing, defense counsel made an ore tenus motion wherein he argued that the trial court no longer retained jurisdiction over this case. (V2 92.) Specifically, he argued that because the affidavit of violation of probation signed on March 6, 1991, and the resulting arrest warrant signed on March 25, were not actually filed with the court until March 29, 1991, two days after Boyd's probation expired, the warrant was not "issued" while Boyd was still on probation, and hence, not while the court still had jurisdiction (V2 92.)

The State argued that while the affidavit and warrant were not filed with the court until March 29, 1991, the warrant was "issued" the day the trial court signed it, on March 25, 1991, and that therefore, the trial court did retain jurisdiction. (V2 102.) The trial court agreed with the State, stating:

> I don't think the filing of the affidavit with the clerk or the filing of an executed or nonexecuted warrant with the clerk is essential, it's the issuance of the warrant by the Court pursuant to an affidavit by a probation officer.

(V2 95.) It then denied Boyd's ore tenus motion to dismiss. (V2 95.)

Boyd admitted the allegations in the affidavit, reserving the right to appeal the trial court's denial of his motion. (V2 95.) The trial court sentenced Boyd to 18 years imprisonment. (V2 113, V1 65.)

Boyd appealed the trial court's denial of his motion to dismiss. The First District Court of Appeal reversed the trial court, and directed it to dismiss the affidavit of violation of probation and discharge Boyd. Boyd v. State, 22 Fla. L. Weekly D2221 (Fla. 1st DCA September 16, 1997). It also certified a question of great public importance to this Court:

> WHEN AN ARREST WARRANT IS SIGNED BY A JUDGE BASED UPON AN AFFIDAVIT ALLEGING A VIOLATION OF PROBATION OR COMMUNITY CONTROL, IS DELIVERY OF THE WARRANT TO THE APPROPRIATE COUNTY SHERIFF FOR EXECUTING A NECESSARY CONDITION PRECEDENT TO COMMENCEMENT OF THE REVOCATION PROCEEDING FOR THE PURPOSE OF DETERMINING WHETHER THE PROCEEDING HAS BEEN COMMENCED BEFORE THE EXPIRATION OF THE TERM OF PROBATION OR COMMUNITY CONTROL?

Id.

CROSS-PETITIONER'S INITIAL BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

ISSUE I.

The First District Court of Appeal erred by reversing the trial court's finding that it retained jurisdiction over Boyd. The trial court correctly found that the arrest warrant based on an affidavit of violation of probation signed March 6, 1991, was "issued" when the magistrate completed and signed the warrant on March 25, 1997, two days before Boyd's probationary period expired.

Issuance of a warrant is a judicial act, not a bureaucratic process. The plain meaning of the applicable statutory provisions is clear. § 901.02 Fla. Stat. (1991) provides that a warrant is to be issued when a magistrate reasonably believes a probationer has committed an offense within his jurisdiction. § 901.04 provides that the warrant is to be directed to and executed by a county sheriff. It is readily apparent that there is no requirement that a warrant be directed to a sheriff before it is deemed "issued".

Moreover, two standard principles of statutory construction support the State's argument and the trial court's holding below. *In pari materia* provides that related statutes be compared and construed together, and *expressio unius est exclusio alterius* holds that the mention of one thing implies the exclusion of another. When applied to the above cited provisions, it becomes

illogical to insist that delivering a warrant to a sheriff is a necessary prerequisite to "issuance".

Additionally, Florida Rule of Criminal Procedure 3.121, entitled "arrest warrant" which sets out the requirements of an arrest warrant, fails to even mention delivery of the warrant to a sheriff as a requirement for "issuance".

Boyd here on appeal, and the First District below, rely solely upon a case from 1930 to support the proposition that "issuance" of a warrant requires delivery to a sherriff. That case was superseded by the statutory provisions cited above as well as rule 3.125, which indicate that delivery is not considered part of "issuance". To find that issuance of a warrant requires delivery to a sheriff improperly reads an additional element into the governing statute, and this Court should therefore answer the certified question in the negative.

ARGUMENT

ISSUE I

WHEN AN ARREST WARRANT IS SIGNED BY A JUDGE BASED UPON AN AFFIDAVIT ALLEGING A VIOLATION OF PROBATION OR COMMUNITY CONTROL, IS DELIVERY OF THE WARRANT TO THE APPROPRIATE COUNTY SHERIFF FOR EXECUTING A NECESSARY CONDITION PRECEDENT TO COMMENCEMENT OF THE REVOCATION PROCEEDING FOR THE PURPOSE OF DETERMINING WHETHER THE PROCEEDING HAS BEEN COMMENCED BEFORE THE EXPIRATION OF THE TERM OF PROBATION OR COMMUNITY CONTROL?

The posture of this case is unusual. Although Boyd prevailed below, he voluntarily placed himself in jeopardy by petitioning for review here. The State also petitioned for review and thus appears as cross-petitioner and respondent.

PRESERVATION. Appellant preserved this issue for appeal during the motion hearing when he argued that the trial court did not have jurisdiction because the affidavit was not filed, and the warrant was not issued prior to appellant's probation expiring. Specifically, appellant argued that the signing of the warrant did not constitute issuing the warrant. Jurisdiction is always at issue but it should be noted that the five-year lapse in raising the issue, which depended in large part on a factual claim, hampers both the State and the court in determining what occurred factually in March 1991.

STANDARD OF REVIEW. The trial court's factual findings (who, what, where, when, and how), either express or implied, are subject to competent substantial evidence review. State v. Daniel, 665 So. 2d 1040 (Fla. 1995) ("Turning to the facts at

hand, we are constrained to review the record on appeal under the competent substantial evidence standard.”). The ultimate issue of jurisdiction, however, is a legal question, and should be reviewed de novo. See e.g., United States v. Perez-Herrera, 86 F. 3d 161, 163 (10th Cir. 1996) (jurisdictional questions are questions of law and reviewed de novo); State v. Babbitt, 75 F. 3d 449, 451 (9th Cir. 1995) (the district court’s determination regarding jurisdiction is reviewed de novo); Joelson v. United States, 86 F. 3d 1413, 1416 (6th Cir. 1996) (appellate court reviews the trial court’s decision on lack of jurisdiction de novo).

BURDEN OF PERSUASION. Because it did not prevail below in the district court, it is appropriate for the State to petition for review of the certified question. However, the trial court's findings are presumptively correct and the review of the legal issue is de novo.

MERITS. In Carroll v. Cochran, 140 So. 2d 300 (Fla. 1962), this Court stated that:

> [U]pon expiration of the probationary period the court is divested of all jurisdiction over the person of the probationer unless in the meantime the processes of the court have been set in motion for revocation or modification of the probation pursuant to Section 948.06, F.S., F.S.A. * * *

Id. at 301 (citing with approval State ex rel. Ard v. Shelby, 97 So. 2d 631, 632 (Fla. 1st DCA 1957)). Notwithstanding the fact that the warrant for Carroll’s arrest was not served on him, and neither the court’s order of revocation of probation, nor its

judgment and sentence were entered until a date subsequent to the expiration of his probation, this Court went on to hold:

> It is our opinion that in the instant case the processes of the trial court had been set in motion, for the warrant for petitioner's arrest because of his violation of probation was issued within the period of probation

Carroll 140 So. 2d at 301. Subsequent Florida decisions have reaffirmed this holding that the "issuance" of an arrest warrant is sufficient to "set the processes of the trial court in motion." See Fryson v. State, 559 So. 2d 377 (Fla. 1st DCA 1990); State v. Wimberly, 574 So. 2d 1216 (Fla. 2d DCA 1991); Rodriguez v. State, 511 So. 2d 444 (Fla. 2d DCA 1987). However, these cases fail to define what specifically constitutes the "issuance" of an arrest warrant. The First District Court of Appeal held below, and Boyd argues here, that a warrant must be delivered to the sheriff for its issuance to be complete. The State respectfully disagrees.

The analysis appropriately begins by reviewing two applicable statutory provisions:

> **901.02 When warrant of arrest to be issued.**-A warrant may be issued for the arrest of the person complained against if the magistrate, from the examination of the complainant and other witnesses, reasonably believes that the person complained against has committed an offense within his jurisdiction.
>
> **901.04 Direction and execution of warrant.**-Warrants shall be directed to all sheriffs of the state. A warrant shall be executed only by the sheriff of the county in which the arrest is made unless the arrest is made in fresh pursuit, in which event it may be executed by any sheriff who is advised of the existence of the warrant. An arrest may be made on any day and at any time of the day or night.

Fla. Stat. (1991). These provisions were initially passed in 1939 and have not been amended since 1970.

It is well-established that:

> [T]he legislative intent be determined primarily from the language of the statute because a statute is to be taken, construed and applied in the form enacted. The reason for this rule is that the Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute.

Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (internal citation omitted). See also e.g., Moonlit Waters Apartments, Inc., v. Cauley, 666 So. 2d 898, 900 (Fla. 1996) ("In consturing a statute we look first to the statute's plain meaning."). Clearly, § 901.02 concerns the issuing of an arrest warrant, and says nothing of presenting a warrant to a sheriff as part of "issuance." Rather, a separate statutory provision, § 901.04 incorporates delivery or direction to the sheriff as part of executing the warrant, a completely separate process. Issuance of a warrant, pursuant to statute, is a judicial act; it is not a bureaucratic process. To find otherwise is to read an additional element into the governing statute in violation of the plain meaning doctrine.

Two other general principles of statutory construction support the State's interpretation. When statutes are related, they should be construed *in pari materia.* Hillsborough County v. NCJ Inv. Co., 605 So. 2d 1287, 1288 (Fla. 2d DCA 1992).

> Under this principle, statutes pertaining to the same type of subject "should be construed together and compared with each other." That is, "[t]o the extent that an understanding of one may aid in the

> interpretation of the other, they should be read and considered together."

Id. Moreover, "[i]t is of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*." Thayer, 335 So. 2d at 817 (italics supplied). Under these basic principles of statutory construction, §§ 901.02 and 901.04 should be construed together, as they appear next to each other in chapter 901 concerning arrests, and both specifically relate to the procedural requirements regarding arrest warrants. Where § 901.02 describes the issuance of an arrest warrant, § 901.04 separately addresses what happens to the warrant **after** it is issued; is it directed to and executed by the sheriff. These provisions should be treated as if they treat separate and independent subjects, precisely because they do.

The State's position is further supported by Fla.R.Crim.P. 3.121 entitled "arrest warrant." Subsection (a) of this rule deals particularly with the issuance of an arrest warrant and provides:

> **(a)** An arrest warrant, when issued shall:
> (1) Be in writing and in the name of the State of Florida;
> (2) Set forth substantially the nature of the offense
> (3) Command that the person against whom the complaint was made be arrested and brought before a magistrate;
> (4) Specify the name of the person to be arrested or, if his name is unknown to the magistrate, designate such person by any mane or description by which he can be identified with reasonable certainty;
> (5) State the date when issued and the County where issued;

(6) Be signed by the magistrate with the title of his office; and
(7) In all offenses bailable as of right be endorsed with the amount of bail and the return date.

Fla.R.Crim.P. (1991). By using the word "shall," the rule enumerates precisely what must be done to issue an arrest warrant. Conspicuously missing, is **any** reference to delivering or directing the warrant to the county sheriff as part of issuance. It seems clear, that an arrest warrant is "issued," **when it contains the requisite information and is properly signed by a magistrate**, once a magistrate reasonably believes that the subject of the warrant has committed an offense within his jurisdiction.

Support for this interpretation is found in a case cited by Boyd in his initial brief, Akers v. State, 370 So. 2d 81 (Fla. 1st DCA 1979). There, in the recitation of facts, the District Court asserted:

> At the hearing on the motion, the State adduced evidence that an arrest warrant was **issued on 1 August 1973** and **delivered to the sheriff's office on 2 August 1973**, where it was filed . . . .

Id at 82. Clearly, the Court found that issuance of a warrant, and its delivery to the sheriff's office were two separate and distinct acts. This interpretation is only logical. It is the processes of the **court** which must be set in motion to retain jurisdiction, not the processes of law enforcement.

The First District, and Boyd rely on Dubbs v. Lehman, 100 Fla. 799, 130 So. 36 (1930), an old Florida Supreme Court case to support its position that issuance of warrant requires delivery

to the sheriff. Reliance on this authority is misplaced for two reasons. First, this case was superseded by the above cited statutory provisions which were first adopted in 1939, as well as criminal rule of procedure 3.121. Second, as Judge Mickle stated in his dissenting opinion in this case, Dubbs articulated the rule for initiating a **prosecution**, before the statute of limitations ran, which differs significantly from initiating probation revocation. Probation is a matter of judicial grace, not a right, and once violated, all that is needed is that the processes of the court be engaged before expiration of the probationary term. A prosecution on the other hand, is the initial bringing of formal criminal charges against one presumed innocent.

As a practical matter, the processes of the court are set in motion by a magistrate believing sufficient grounds for revocation have been alleged in a signed violation of probation affidavit, and then signing and thus issuing an arrest warrant for a probationer's arrest based on this affidavit. A judge's act of signing an arrest warrant commanding the appearance of the probationer before the court sets the court's processes in motion. While Boyd advocates drawing an arbitrary line between the signing of a completed arrest warrant and delivering the warrant to the sheriff, he offers no reason or justification for such a demand. There is no purpose served by requiring the judge set the warrant in hands of the sheriff before the warrant can be said to be "issued."

§ 948.06(1) Fla. Stat. (1987) instructs that:

> Whenever within the period of probation or community control there is reasonable ground to believe that a probationer or offender in community control has violated his probation or community control in a material respect, any parole or probation supervisor may arrest such probationer or offender without warrant wherever found and shall forthwith return him to the court granting such probation or community control. **Any committing magistrate may issue a warrant**, upon the facts being made known to him by affidavit of one having knowledge of such facts, for the arrest of the probationer or offender, returnable forthwith before the court granting such probation or community control. . . .

Clearly, under this statute it is not difficult to begin proceedings for the violation of controlled release. The State argues that the plain meaning regarding the issuing of a warrant, is that a trial court will determine whether it is reasonable to issue a warrant, i.e. whether probable cause exists, and only where the prerequisites have been met, will it fill out the warrant and sign it. This filling out and signing the warrant constitutes "issuance." No other action is indicated or contemplated by the statute or by the criminal rules to "issue" the warrant.

The State respectfully urges this Court to adopt the reasoning of the State, and Judge Mickle in his dissenting opinion in this case, and answer the certified question in the negative.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

As respondent, the State adopts the statement of the case and facts set out in the Cross-Petitioner's Initial Brief on the Merits above. For the reasons set forth in the Cross-Petitioner's Initial Brief on the Merits above, the State respectfully urges this Court to answer the certified question in the negative.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at 22 Fla. L. Weekly D2221 (Fla. 1st DCA September 16, 1997) should be disapproved, and the sentence entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

_____
LAURA FULLERTON LOPEZ
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0093981

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR PETITIONER
[AGO# L97-1-14611]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to Charles Raymond Dix, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of December, 1997.

_____
Laura Fullerton Lopez
Attorney for the State of Florida

[C:\S.C.- Opinions\91556.A --- 4/30/01,11:41 am]