

IN THE SUPREME COURT OF FLORIDA

JERRY GRIFFIS,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 92,160

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as the State. Petitioner, Jerry Griffis, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or Appellant.

The symbol "R" will refer to the record on appeal. The symbols "I" and "II" will refer to the transcript of the February 15, 1990 trial as designated on the front cover of the volumes. The symbol "III" will refer to the trial court proceedings held on January 18, 1990, pages 289 to 404. The symbol "IV" will refer to the trial court proceedings held on June 5, 1996, pages 405 to 416. The symbol "V" will refer to trial court proceedings held on February 12, 1990, pages 417 to 546. The symbol "VI" will refer to the trial court proceedings held on February 2, 1990, pages 547 to 632. The symbol "VII" will refer to the trial court proceedings held on February 6, 1990, pages 633 to 668. The symbol "VIII" will refer to the trial court proceedings held on April 2, 1997, pages 669 to 679. The symbol "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts with the following addition:

Petitioner states that "Griffis surrendered to Alachua County authorities on May 10, 1996". The petitioner cites to the stipulation entered into between the State Attorney and defense counsel. However, that stipulation states that "appellant was not surrendered to Alachua County authorities until May 10, 1996." (R. 158-159). Appellant was arrested in Virginia. (IV. 410). There was no voluntary return.

SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative and decline to re-evaluate the holding in Gurican in light of the United States Supreme Court's decision in Ortega-Rodriguez. Even if this Court decides to follow the holding of Ortega-Rodriguez, Petitioner's appeal should be dismissed. The United States Supreme Court specifically acknowledged that a long escape could so delay the onset of appellate proceedings that the State would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal.

ARGUMENT

ISSUE

SHOULD THE HOLDING IN *STATE v. GURICAN*, 576 So.2d 709 (Fla. 1991), BE RE-EVALUATED IN LIGHT OF *ORTEGA-RODRIGUEZ v. UNITED STATES*, 507 U.S. 234 (1993)? (Restated)

The Petitioner argues that his appeal should not be dismissed in light of the fact that he absconded and was captured before he filed his notice of appeal. The State respectfully disagrees. This Court should follow its own precedent established in *State v. Gurican*, 576 So.2d 709 (Fla. 1991) and dismiss the Petitioner's appeal. Petitioner was present for jury selection in his case on February 12, 1990. Petitioner then failed to appeal for the rest of trial and was tried in absentia. The jury found Petitioner guilty as charged of four counts of sexual battery on a child under the age of twelve and two counts of a lewd and lascivious assault. (R. 129-131). The trial court denied Petitioner's motion for new trial on March 1, 1990. (R. 132). Petitioner was arrested on May 10, 1996, was adjudicated guilty and sentenced on June 5, 1996 and filed a notice of appeal. The Petitioner then filed an initial brief in the First District Court of Appeal and the State filed a motion to dismiss, citing *State v. Gurican*, 576 So.2d 709 (Fla. 1991). The First District Court of Appeal granted the State's motion to dismiss Petitioner's appeal but certified the following question as one of great public importance: SHOULD THE HOLDING IN *STATE v. GURICAN*, 576 So.2d 709 (Fla. 1991), BE RE-EVALUATED IN LIGHT OF *ORTEGA-RODRIGUEZ v. UNITED STATES*, 507 U.S. 234 (1993)?

In Gurican, after the defendant was found guilty of drug trafficking, he absconded from the jurisdiction. The defendant remained a fugitive for four years then returned to the jurisdiction, at which time the trial court adjudicated her guilty and sentenced her. The State filed a motion to dismiss her appeal and argued that by fleeing the jurisdiction, the defendant had waived her right to appeal her conviction. Id. at 710. This Court agreed that her appeal should be dismissed and stated:

Pursuant to Florida Rule of Appellate Procedure 9.110(b), parties seeking appellate review have thirty days from the date the final order is rendered to file their appeals. But for [the defendant] fleeing the jurisdiction, the trial court would have adjudicated her guilty and would have sentenced her. When the court denied her motion for a new trial ...she would have had thirty days from that date in which to file her appeal. As a result of her absence, [the defendant] unilaterally extended the time for filing a notice of appeal of her conviction, under her proposed reasoning, for over four years.

This Court will not condone such action. We will not burden our already overcrowded court system with adjudicating the appeals of individuals who have flouted its processes by absconding from the jurisdiction. By fleeing the court's jurisdiction instead of obeying the conditions of her pretrial release, [the defendant] demonstrated her overt disrespect for the judicial system. Her absence thwarted the orderly, effective administration of justice and, as such, disentitles her of the right to call upon its protections.

In future cases where the convicted defendant escapes and fails to appear for sentencing, we advise trial courts to proceed in absentia and render their final judgments adjudicating the defendant guilty. Thus, the thirty-day period for filing an appeal will commence running unless it is tolled until the court disposes of any authorized and timely post-trial motion as specified in Florida Rule of Appellate Procedure 9.020. If the defendant fails to return and timely file an appeal of the conviction, the appellate court shall dismiss any later appeal unless the defendant can establish that the escape or failure to appear was legally justified. On the other hand, if the

defendant returns to the jurisdiction and files an appeal within the thirty-day period, that appeal shall be considered timely filed. At that point, because there would be no delay in the administration of justice, no reason would exist to dismiss the defendant's appeal.

Thus, we hold that, as a matter of policy, appellate courts of this state shall dismiss the appeal of a convicted defendant not yet sentenced who flees the jurisdiction before filing a notice of appeal and who fails to return and timely file that appeal unless the defendant can establish that the absence was legally justified. In the instant case [the defendant], who absconded from the court's jurisdiction for four years, cannot prosecute her appeal of her conviction upon her return. She may, however, appeal any alleged defects in her sentencing which occurred after her return.

Id. at 712. (Citations omitted).

Petitioner argues that this court should reverse its decision in Gurican based on the United States Supreme Court decision in Ortega-Rodriguez v. United States, 507 U.S. 234, 113 S.Ct. 1199 (1993). In Ortega-Rodriguez, the defendant was convicted of drug charges then failed to appear for sentencing. The defendant was sentenced in absentia and was arrested eleven months later. The defendant was given an additional sentence of twenty-one months in prison to be served after the completion of the sentence on the drug offenses. Id. at 1202. The government moved to dismiss the appeal. While the Supreme Court acknowledged that it is well settled that an "appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal", the Court ruled that escaping prior to sentencing and before appeal should not necessarily result in dismissal of an appeal. The Court ruled that "when a defendant's flight and recapture occur before appeal, the defendant's former fugitive

status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal". Id. at 1209. The Court decided that "the contemptuous disrespect manifested by [the defendant's] flight was directed at the District Court" and refused to allow "an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings." Id. at 1207. The Court also stated:

We do not ignore the possibility that some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction. For that reason, we do not hold that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal. For example, the Eleventh Circuit, in formulating the Holmes rule, expressed concern that a long escape, even if ended before sentencing and appeal, may so delay the onset of appellate proceedings that the Government would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal. Holmes, 680 F.2d, at 1374; see also United States v. Persico, 853 F.2d, at 137. We recognize that this problem might, in some instances, make dismissal an appropriate response.

Id. at 1208.

The United States Supreme Court decided Ortega-Rodriguez on the basis of its supervisory power over the federal courts and not on the basis of any constitutional principle and therefore, this Court is not bound by its decision. Instead, this Court should adopt the reasoning of the Missouri Supreme Court's opinion in State v. Troupe, 891 S.W.2d 808 (Mo. 1995) in which that court declined to follow Ortega-Rodriguez and dismissed the appeal of a defendant who

had fled prior to sentencing and was recaptured eight months later.

The Court reasoned as follows:

Although application of the escape rule clearly requires a relationship between the escape and prejudice to the criminal justice system, this Court does not agree that the rule may be applied by an appellate court only when the appellate process itself is substantially prejudiced.

In the present case, appellant was at large for more than eight months. His escape, therefore, hindered the administration of justice in his case by at least this amount of time. It strains credulity to postulate that such a delay does not have an adverse impact on the criminal justice system and the state's case. If appellant were successful on the merits of an appeal, the cause might be remanded for a new trial. In that event, the state could be prejudiced by lost or destroyed evidence and witnesses who are no longer available. Further, over time, witnesses' memories fade, subjecting them to impeachment and consequent diminished credibility.

In escaping from custody, whether before or after filing a notice of appeal, a defendant flouts the authority of the courts. Ortega-Rodriguez, which permits dismissal pursuant to the fugitive from justice rule only if the escape had a "significant interference with the operation of [the] appellate process"allows a defendant potentially to gain by flouting the authority of the court. This Court will not adopt a rule that permits a defendant to benefit from his own misconduct.

A reviewing court may invoke procedural rules to protect the orderly and efficient use of its resources. In applying the escape rule, the relevant inquiry is whether the escape adversely affects the criminal justice system. If so, dismissing the escapee's appeal is appropriate. This determination is left to the sound discretion of the appellate tribunal.

This Court determines that a delay of more than eight months necessarily has an adverse impact on the criminal justice system. Appellant's appeals are, therefore, dismissed.

Id. at 810, 811.

This Court should follow the policy established in Gurican and reject the holding of Ortega-Rodriguez that requires that a defendant's absence specifically interfere with the appellate process in order for his case to be dismissed. Rather, a defendant's appeal should be dismissed if he flees the jurisdiction while his case is being tried or while it is on appeal. In the instant case, contrary to the appellant's assertion, his former fugitive status does not lack a connection to the appellate process. If the appellant had not fled during his trial, his appeal would have commenced when he filed his notice of appeal within thirty days of the date he was sentenced and would have long since become final. As a result of his flight, the proceedings in appellant's case were delayed for over six years. Additionally, the appellant flouted the entire judicial process, not just the trial court, by fleeing and remaining absent from the jurisdiction for such an extended amount of time. Appellant is not entitled to be treated with the same consideration as a defendant who properly submits himself to the authority of the trial court and appellate court and his appeal should therefore be dismissed.

In Ortega-Rodriguez, the Court was particularly disturbed by the fact that the defendant had been charged with escape and sentenced to three years consecutive to the sentence that he received on the underlying charge. The Court questioned the equity of dismissing the defendant's appeal and adding time to his sentence. However, the appellant was not charged with escape or given any additional time on his sentence. Because the trial court did not penalize the

appellant for the six years that he was a fugitive from the jurisdiction, this Court should dismiss his appeal.

Following the dictates of Ortega-Rodriguez would encourage defendants to flee. Bellows v. State, 871 P.2d 340 (Nev. 1994)(holding that "allowing an appeal after an escape 'flouts the judicial process' and encourages other prisoners to escape"). A defendant would be put on notice that if he is convicted of a crime, it would be to his advantage to abscond from the jurisdiction before he is sentenced. Even if he was later captured, he would still be permitted to appeal his conviction and, if the conviction is overturned, the delay would make it more likely that he could not be successfully retried. In the meantime, if he is not recaptured, he would be able to enjoy his freedom.

Appellant points out that in the instant case, the trial court did not adjudicate him guilty and sentence in absentia as this court recommended in Gurican and that as a result, he concludes that his flight did not unilaterally extend the time for filing the appeal. However, in Gurican, this court held, in circumstances substantially similar to those in the instant case, that the defendant had unilaterally extended the time for filing the appeal. Further, the trial in the instant case took place before the opinion in Gurican was released so the trial court was unaware that it should have adjudicated appellant guilty and sentenced him in absentia.

There is no need for this Court to reconsider its holding in Gurican. The opinion makes it clear that this Court was aware of

the distinction between cases in which the defendant fled while his appeal was pending and cases in which the defendant had returned to the jurisdiction before he appealed his conviction. This Court rejected the idea that the two types of cases should be treated differently.

Even if this Court decides to follow the holding of Ortega-Rodriguez, Petitioner's appeal should be dismissed. The United States Supreme Court specifically acknowledged that a long escape could so delay the onset of appellate proceedings that the State would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal. As the Ninth Circuit stated:

[The defendant] should not benefit from his thirteen years of misbegotten freedom. 'It would be unconscionable to allow such a defendant to benefit from the delay by forcing the government to re-prosecute him long after memories have dimmed and evidence has been lost. It is equally disturbing that defendant's deliberate attempt to evade his day of reckoning, successful for a time, should be allowed to impose additional burdens upon the judiciary to accommodate claims that should be forfeited by flight.'

United States v. Sudthisa-Ard, 17 F.3d 1205, 1208 (9th Cir. 1994)(holding that "thirteen-year fugitive status prejudiced the government's ability to retry the case in the event of reversal and made meaningful review impossible"); United States v. Rosales, 13 F.3d 1461 (11th Cir. 1994)(dismissing appeal of defendant who fled before filing his notice of appeal, was recaptured and filed his initial brief four and a half years after he was convicted and holding that "[b]ecause there is a direct causal relationship between [the defendant's] flight and the extreme delay in this case,....the government would be unduly burdened if we reach the

merits of this case"); United States v. Bravo, 10 F.3d 79 (2nd Cir. 1993)(affirming district court's refusal to consider postconviction motions filed upon recapture by a defendant who fled prior to sentencing and stating, "there can be little doubt that [the defendant's] fifteen-year absence has severely undermined the government's ability to assemble witnesses and evidence for any retrial that might result from a determination of trial error...");

In the instant case, the appellant was convicted of sexual battery upon a child. The appellant fled from the jurisdiction and was not returned to custody for more than six years. Obviously, this length of delay in the onset of the appellate proceedings would severely prejudice the State's ability to locate witnesses and present evidence in the event that appellant's case had to be retried. See, McCray v. State, 699 So.2d 1366, 1368 (Fla. 1997)(noting that "[a]s time goes by, records are destroyed, essential evidence may become tainted or disappear, memories of witnesses fade, and witnesses may die or be otherwise unavailable" and holding that "any petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel is presumed to....prejudice the state if the petition has been filed more than five years from the date the petitioner's conviction became final"; therefore, doctrine of laches should be applied to bar such petitions). Additionally, the victim would be forced to recount the molestation that occurred when he was five years old.

In summary, this Court should answer the certified question in the negative and decline to re-evaluate the holding in Gurican in

light of the United States Supreme Court's decision in Ortega-Rodriguez. Further, even if this Court decides to adopt the holding of Ortega-Rodriguez and dictate that a defendant's appeal only be dismissed if his flight interferes with the appellate process, because of the substantial length of time that the appellant remained absent from the jurisdiction, this Court should dismiss his appeal.

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 23 Fla.L. Weekly D186 (Fla. 1st DCA December 30, 1997) should be approved, and the Respondent's appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Paula S. Saunders, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of February, 1998.

Trina Kramer
Attorney for the State of Florida

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JERRY GRIFFIS,

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v.

STATE OF FLORIDA,

Appellee.

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APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Griffis v. State, 23 Fla.L. Weekly D186 (Fla. 1st DCA December 30, 1997).