

IN THE SUPREME COURT OF FLORIDA

VERSIAH M. TAYLOR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 94,070

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 Respondent, the prosecution, or the State. Petitioner, Versiah M. Taylor, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of three volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

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

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's statement of the case and facts, with the following additions, corrections or qualifications.

Petitioner was present on February 9, 1998, for the selection of the jury to try his case. (R I 37-38) Petitioner failed to appear on February 12, 1998, for the remainder of the trial and was tried in absentia. (R III 3-4)

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 because unlike the defendant's involved in Griffis and Ortega-Rodriguez petitioner was not back in custody when he invoked the jurisdiction of the appellate court.

ARGUMENT

ISSUE I

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)

Petitioner argues that his appeal should not be dismissed, even though he absconded, because his lawyer filed a notice of appeal and the appellate process was not interfered with. Respondent rejects such assertions and urges this Court to deny relief based its own precedent established in *State v. Gurican*, 576 So.2d 709 (Fla. 1991).

Facts

Petitioner was present for jury selection in his case on February 9, 1998. (R I 37-38) Petitioner failed to appear on February 12, 1998, for the remainder of the trial and was tried in absentia. (R III 3-4) The jury found Petitioner guilty of possession of cocaine, attempted tampering with physical evidence, resisting an officer without violence and driving while his license was suspended. (R I 39-40) The trial court granted a mistrial on the resisting charge and the state nolle prossed that charge. (R III 82-83) Petitioner was adjudicated guilty and sentenced on March 3, 1998. (R II 2-3) A notice of appeal was filed on March 17, 1998 by petitioner's trial counsel, presumably without contact with his fugitive client. (R I 55) On May 1, 1998, 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. Subsequently, petitioner's counsel filed a motion for certification and the Court 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)?

Jurisdiction

Pursuant to Article V § 3(b)(4) Florida Constitution this Court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be one of great public importance." The District Court of Appeal of Florida, First District has certified the above stated question.¹ Therefore, this Court has discretion to exercise jurisdiction even though, as shown below, Ortega-Rodriguez has no factual or legal relevance to the instant case.

Exercise of Jurisdiction

While this Court has jurisdiction to answer this question certified by the lower tribunal, it also has the discretion to decline to do so. State v. Burgess, 326 So.2d 441 (Fla. 1976), Stein v. Darby, 134 So.2d 232 (Fla. 1961) The state urges this Court to exercise its discretion and decline to review this case. Coffin v. State, 374 So.2d 504, 508 (Fla. 1979) This Court should

¹ The same question was previously certified in Griffis v. State, 703 So.2d 522 (Fla. 1st DCA 1997). The Griffis case has been briefed and argued. See Griffis v. State, no 92,160

decline jurisdiction because the holding in Ortega-Rodriguez, does not dictate a result other than dismissal. By its terms, Ortega-Rodriguez applies to cases where a defendant returns to custody prior to appealing his conviction. The facts of Petitioner's case are that he invoked the jurisdiction of the appellate court while he had absconded. He does not fall within the scope of the Ortega-Rodriguez modification of the general rule. Instead, petitioner falls squarely within the general rule recited by the United States Supreme Court when it said:

(A) This Court's settled rule that dismissal is an appropriate sanction when a convicted defendant is a fugitive during "the ongoing appellate process," see *Estelle v. Dorrough*, 420 U.S. 534, 542, n. 11, 95 S.Ct. 1173, 1178, n. 11, 43 L.Ed.2d 377, is amply supported by a number of justifications, including concerns about the enforceability of the appellate court's judgment against the fugitive, see, e.g., *Smith v. United States*, 94 U.S. 97, 24 L.Ed. 32; the belief that flight disentitles the fugitive to relief, see *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586; the desire to promote the "efficient ... operation" of the appellate process and to protect the "digni[ty]" of the appellate.

Ortega-Rodriguez v. U.S., 507 U.S. 234, 113 S.Ct. 1199, 1200(1993)

Since, petitioner's whereabouts were unknown during his appeal the general rule applies. This Court should decline review and uphold the dismissal. The state further suggests that there is no constitutional or statutory authority for the appointment of appellate counsel to a fugitive.

Merits

The District Court of Appeal, First District of Florida, withdrew its mandate and allowed rehearing of its original decision to dismiss. Petitioner moved to certify the a question and the

court granted the motion. The certified question is the same question certified in Griffis v. State, no 92,160.

However, the facts in the instant case are substantially different from the facts of Griffis. Griffis was present for jury selection in his case on February 12, 1990. Griffis failed to appear for the rest of trial and was tried in absentia. The jury found Griffis guilty as charged of four counts of sexual battery on a child under the age of twelve and two counts of lewd and lascivious assault. The trial court denied Griffis's motion for new trial on March 1, 1990 but took no other action. Griffis was arrested on May 10, 1996, was adjudicated guilty and sentenced on June 5, 1996 and filed a notice of appeal. Griffis 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 Griffis's appeal but certified the question as one of great public importance:

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).

The Griffis case is a pre-Gurican case in which the trial court did not have the advantage of this Court's ruling in deciding how to treat the absconded felon.

The instant case on the other hand is a post Gurican case in which the trial court followed the directives of this Court. It adjudicated the defendant and sentenced him. The state maintains that pursuant to Gurican dismissal was proper as petitioner did not return within the time for filing an appeal.

In Gurican, this Court stated that

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.

Id.

Petitioner did not return within thirty days and direct counsel to appeal. Counsel did it, without a request from the absconded client. Clearly this is a case where the petitioner is asserting a untenable right to invoke the jurisdiction of the courts of this state while thumbing his nose at them. There are legal means of obtaining post-trial release pursuant to Section 903.132, Fla. Stat. (1995). It would be a judicial aberration to permit a process where a fugitive obtains such release by the complicity of his counsel and the judicial system by blatantly declaring - "keep litigating, I'm off to, e.g., Brazil."

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 is the policy that the courts of this state have been applying since Gurican. See Fletcher v. State, 696 So.2d 794 (Fla. 2nd DCA 1997) This Court reiterated this policy in Capuzzo v. State, 596 So.2d 438 (Fla. 1992) when it stated:

Where a defendant absents himself or herself by fleeing the court's jurisdiction, that defendant cannot claim lack of an express waiver. In such circumstances, securing an express waiver is impossible and the defendant's actions constitute a valid waiver. E.g., State v. Gurican, 576 So.2d 709, 712 (Fla.1991) ("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"); Dufour v. State, 495 So.2d 154, 161 (Fla.1986) (defendant voluntarily absented himself from pretrial motions hearing by "embarking on a 'hunger strike' culminating in his hospitalization during the hearing"), cert. denied, 479 U.S. 1101, 107 S.Ct. 1332, 94 L.Ed.2d 183 (1987). A contrary rule of law would be repugnant to the rationale behind rule 3.180, which inherently dictates that defendants cannot be allowed to thwart or impede the judicial process through their own misconduct. Melendez, 244 So.2d at 139.

Id at 440

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 fugitive status does not lack a connection to the appellate process. Here the appellant flouted the entire judicial process, not just the trial court, by fleeing and remaining absent from the jurisdiction of the courts while trying to use the courts to reverse his conviction on appeal. 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.

Furthermore, adopting the policy behind 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. 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.

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.

If this Court decides to follow the holding of Ortega-Rodriguez, it should not expand that holding. By its terms, Ortega-Rodriguez applies to cases where a defendant returns prior to appealing his case. The facts of Petitioner's case do not fall within the scope of the Ortega-Rodriguez modification of the general rule. Petitioner falls squarely in the general rule recited by the United States Supreme Court when it said:

(A) This Court's settled rule that dismissal is an appropriate sanction when a convicted defendant is a fugitive during "the ongoing appellate process," see Estelle v. Dorough, 420 U.S. 534, 542, n. 11, 95 S.Ct. 1173, 1178, n. 11, 43 L.Ed.2d 377, is amply supported by a number of justifications, including concerns about the enforceability of the appellate court's judgment against the fugitive, see, e.g., Smith v. United States, 94 U.S. 97, 24 L.Ed. 32; the belief that flight disentitles the fugitive to relief, see Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586; the desire to promote the "efficient ... operation" of the appellate process and to protect the "digni[ty]" of the appellate court, see > Estelle, 420 U.S., at 537, 95 S.Ct., at 1175; and the view that the threat of dismissal deters escapes, see > ibid. Pp. 1203-1205.

v. U.S., 507 U.S. 234, 113 S.Ct. 1199, 1200(1993)

Petitioner absconded and at the same time invoked the appellate process. Application of Ortega-Rodriguez provides him no relief. Furthermore, Petitioner has provided this Court no basis to change the general rule or to alter the holding of Gurican. Therefore, relief should be denied.

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. However, 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. It should limit this modification as the United States Supreme did to defendants who return to custody prior to appealing. In either event, the result in this case would be the same, the order of dismissal should be upheld.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision the District Court of Appeal reported at 711 So.2d 1387 (Fla. 1st DCA 1998) should be approved, and the appeal 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 David P. Gauldin, Esquire, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this _____ day of November, 1998.

Edward C. Hill, Jr.
Attorney for the State of Florida

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