ORIGINAL

IN THE SUPREME COURT OF FLORIDA

VERSIAH M. TAYLOR,

Petitioner,

v. CASE NO. 94,070

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in Times New Roman (14 point) proportionally spaced.

The record on appeal consists of three volumes and shall be referred to by the volume and page number.

STATEMENT OF THE CASE AND FACTS

By information, petitioner was charged with possession of cocaine, tampering with physical evidence, resisting an officer without violence, and driving while his license was suspended or revoked. (I 23).

Petitioner was tried in absentia on February 12, 1998, on the above charges. At 9:02 on that date the court announced that petitioner had been ordered to appear at 8:30 for his trial, and that on the previous Monday he had been warned that if he were late the trial would proceed without him. (III 3). Defense counsel announced that he had called petitioner's home, that a male had answered, and that petitioner's

whereabouts were unknown but that he might have been at his girlfriend's house. This unidentified male did not know the telephone number of the girlfriend. (III 3).

Defense counsel moved for a continuance, but this was denied. (III 3-4).

Evidence was presented, and at the conclusion of the trial, the jury found petitioner guilty of possession of cocaine, guilty of attempted tampering with physical evidence, guilty of resisting an officer without violence, and guilty of driving while his license was suspended or revoked. (I 39-40).

After the jury rendered its verdicts, the trial court granted a mistrial on count III (the resisting charge) and the state announced a nolle prosse of that charge in order to remove any appellate issues that might have been related to it. (III 82-83).

The trial court then proceeded to sentence appellant to a six-month jail term for willful contempt of court for showing up late on Monday prior to the start of trial (apparently jury selection). (III 84-85).

Sentencing on the remaining counts occurred on March 3, 1998. Defense counsel indicated that he had not seen petitioner since the day of jury selection and that he had checked the local jail facility but petitioner was not in it. (II 67).

Petitioner was sentenced to five years in prison on the possession of cocaine charge with this sentence to run consecutively with petitioner's contempt charge. On counts II and IV, petitioner was sentenced to time served. (I 51-52).

This was a departure sentence with written reasons in the record. (I 54).

Timely notice of appeal was filed by defense counsel on or about March 17, 1998. (I 55).

On or around May 1, 1998, the state filed a motion to dismiss in the appellate court arguing that petitioner's appeal should be dismissed because petitioner's whereabouts at that time were unknown.

On July 1, 1998, the Florida First District Court of Appeal issued its opinion

dismissing petitioner's appeal on the authority of State v. Gurican, 576 So.2d 709 (Fla. 1991) and Griffis v. State, 703 So.2d 522 (Fla. 1st DCA 1997).

Pursuant to a motion for certification by petitioner's counsel, the court reissued an opinion on September 11, 1998, certifying the following question to this Court:

> 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, 113 S.CT. 1199, 122 L.ED.2D 581 (1993)?

On October 9, 1998, this Court issued its order postponing decision on jurisdiction and briefing schedule.

Petitioner was arrested on September 1, 1998, and is presently incarcerated in the CCA-Bay County Facility. (Appendix)[1]

SUMMARY OF THE ARGUMENT

The Florida First District Court of Appeal certified the question whether the holding in State v. Gurican, 576 So.2d 709 (Fla. 1991) should be re-evaluated in light of Ortega-Rodriguez v. United States, 507 U.S. 234, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993).

Essentially, Gurican held that an appellate court will refuse to hear a criminal case when an appellant has escaped and is beyond the court's control, and that the court in Gurican was proper in dismissing an appeal of a defendant who had fled the jurisdiction before sentencing, remained at large for four years, returned, and then filed a notice of appeal.

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[1]This Court is requested to take judicial notice of petitioner's criminal arrest data sheet in the appendix pursuant to Chapter 90.202(12), Florida Statutes.

In Griffis v. State, the same question certified to this Court in this case has been previously certified. Griffis absconded after jury selection, remained at large for six years, returned, was adjudicated guilty, sentenced, and filed a notice of appeal. Griffis' case was dismissed based upon the holding in Gurican.

Petitioner was unexplainedly absent after jury selection, was tried in absentia, was sentenced in absentia, but timely filed a notice of appeal without significant delay. On appeal, the state moved to dismiss, and the dismissal was granted but before the opinion was final, petitioner returned to custody.

The policy considerations (enforceability of the court's jurisdiction and disentitlement to an appeal) are not applicable to petitioner's case.

Petitioner proceeded to trial (albeit in absentia), was sentenced in a timely manner, and filed a notice of appeal in a timely manner. Petitioner proceeded to prosecute his appeal and was once more before the jurisdiction of the court before final dismissal of his appeal.

Under the circumstances, the orderly administration of justice was never disrupted, and as a consequence, the rationale of Ortega-Rodriguez applies, and the certified question should be answered in the affirmative.

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, 113 S.CT. 1199, 122 L.ED.2D 581 (1993)?

This exact question has already been certified to this Court in Griffis v. State, 703 So.2d 522 (Fla. 1st DCA 1997), and is presently pending in this Court in Griffis

v. State, ___ So.2d ___, case number 92,160. The briefs have been filed in Griffis and oral argument has already occurred.

There are factual distinctions among Griffis, Gurican, and this case.

In Gurican, the defendant was present at her trial and a verdict was rendered on June 8, 1984. Sentencing was set for August 1, and Gurican filed motions for a new trial on June 13. Before sentencing, however, Gurican absconded from the court's jurisdiction. The trial court did not formally adjudicate her guilty or sentence her. However, it denied her motions for a new trial on August 31, 1984. Four years later, Gurican voluntarily returned to the jurisdiction and on December 12, 1988, the court entered its final judgment adjudicating her guilty and sentencing her. After sentencing, Gurican filed an appeal which the state moved to dismiss. The district court denied the state's motion to dismiss and reversed her convictions for the reasons stated in the opinion.

The district court then certified to this Court two questions, with this the relevant question:

> SHOULD FLORIDA'S APPELLATE COURTS APPLY THE FEDERAL ESCAPE RULE IN WHICH THE COURT, UPON PROPER MOTION, WILL DISMISS AN APPEAL OF AN ACCUSED WHO HAS FLED THE JURISDICTION BEFORE SENTENCING, AND HENCE BEFORE FILING A NOTICE OF APPEAL, EVEN THOUGH THE ACCUSED IS BACK WITHIN THE COURT'S JURISDICTION WHEN THE MOTION TO DISMISS IS FILED?

In answering this question with a "qualified affirmative" this Court stated that it would not overburden an already overcrowded court system with adjudicating the appeals of individuals who "...have flouted its processes by absconding from the jurisdiction." This Court went on to state that her absence thwarted the "...orderly,

effective administration of justice and, as such, disentitles her of the right to call upon its protections." Id. at 712.

This Court went on to note that as "...a matter of policy..." the district courts of this state should dismiss the appeal of a convicted defendant who is not yet sentenced but who flees the jurisdiction before timely 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." Id. at 712.

In Griffis, the defendant absconded following jury selection, was tried in absentia in February of 1990, and found guilty of various sexual offenses. Griffis' motion for new trial was denied in March 1990, and then more than six years passed before Griffis was returned to custody in May 1996. On June 5, 1996, the trial court adjudicated Griffis guilty and sentenced him to a lengthy prison term. A notice of appeal was thereafter filed on June 20, 1996.

The Florida First District Court of Appeal dismissed Griffis' appeal based upon the ruling in Gurican, but recognized that the policy considerations underlying Gurican had been rejected by the United States Supreme Court in Ortega-Rodriguez v. United States, 507 U.S. 234, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993).

The Florida First District Court of Appeal certified the same question in Griffis that it has certified in this case.

In petitioner's case, the facts are again different than those found in either Gurican or Griffis.

Because petitioner was late for jury selection, the trial court held petitioner in contempt and sentenced him to six months in the county jail. (III 84-85).

On the day of trial, for reasons not disclosed in the record, petitioner was absent. (III 3-4). Defense counsel moved for a continuance, but this was denied. (III 3).

Petitioner was tried in absentia, convicted, and then sentenced in absentia. However, defense counsel timely filed petitioner's notice of appeal. (I 55).

Thus, the appellate process proceeded in an orderly manner.

On May 1, 1998, the state filed a motion to dismiss, alleging that petitioner was not in custody for purposes of the appeal and that under Gurican, his appeal should be dismissed.

On May 22, 1998, petitioner, through appellate counsel, responded that the rationale of Gurican had been seriously undermined by Ortega-Rodriguez v. United States, supra.

The district court issued its first opinion in this case on July 1, 1998, dismissing the appeal. Taylor v. State, 23 Fla. L. Weekly D1611 (Fla. 1st DCA 1998). A motion for certification was granted and the district court issued its opinion filed September 11, 1998, certifying the same question that it certified in Griffis.

In the meantime, and prior to the district court's opinion "on motion for certification" petitioner, on September 1, 1998, was back in the custody of the Bay County Jail.

From this chronology, several facts need to be noticed. Unlike either Gurican or Griffis, the judicial process was never delayed. In Gurican, four years expired before Gurican was adjudicated; in Griffis, six years expired before Griffis was sentenced. In this case, no delay ever occurred. Petitioner was tried in absentia without a continuance, was subsequently sentenced, and timely filed his notice of appeal within the thirty day jurisdictional period. Prior to the Florida First District Court of Appeal's final opinion in this case, petitioner was back in the custody of the Bay County Jail.

Thus, in no way whatsoever was the judicial process ever meaningfully

disrupted (other than that petitioner was not personally present at his trial and sentencing, which was to his detriment, not the state's, because he was thus unable to help defense counsel).

Gurican was predicated upon the federal escape rule in which a court upon motion would dismiss an appeal of an accused who had fled the jurisdiction prior to sentencing and before filing a notice of appeal. The rationale behind this was partly based on enforceability concerns (that an absent appellant would not be subject to the jurisdiction of the court) and on the "disentitlement" theory (that a defendant's flight during the pendency of his appeal was tantamount to waiver or abandonment). Ortega-Rodriguez v. United States, at 507 U.S. 240, 122 L.Ed.2d 592.

Ortega-Rodriguez rejected the enforceability concept where a fugitive is returned to custody before he invokes the appellate process because the risk of unenforceability no longer exists. 507 U.S. 244, 122 L.Ed.2d 594.

The U.S. Supreme Court also rejected the "disentitlement theory" where a fugitive had been returned prior to the start of the appellate process, and additionally rejected the "deterrents rationale" on the basis that a lower court is quite capable of defending its own jurisdiction. 507 U.S. 247, 122 L.Ed.2d 596.

Essentially, this Court in Gurican was concerned that the orderly process of judicial trial and appellate review could be disrupted or delayed for years and that the overcrowded dockets of both the trial courts and the appellate courts could not and should not suffer such unnecessary burdens which are created when a defendant voluntarily flees the jurisdiction.

In petitioner's case, none of these considerations are present.

First, petitioner was tried in absentia. There was no disruption of the trial proceedings, no continuance, no delay occasioned because of petitioner's unexplained absence on the day of trial.

Second, the trial court did not significantly or materially postpone petitioner's sentencing and the trial court proceeded to promptly adjudicate and sentence petitioner.

Third, defense counsel, on behalf of petitioner, timely filed petitioner's notice of appeal.

Fourth, appellate counsel proceeded to prosecute petitioner's appeal on a timely basis. Even though the state moved to dismiss petitioner's appeal on the basis that he was not within the court's jurisdiction, petitioner was clearly back within the court's jurisdiction prior to the finalization of the opinion dismissing petitioner's appeal.

Thus, neither the trial process nor the appellate process was any way affronted by petitioner's unexplained absence. The policy considerations that might have been present in Gurican or even in Griffis are simply not present in this case. The judicial process in Gurican was delayed for at least four years, and at least six years in Griffis; the judicial process was never delayed in petitioner's case, as petitioner's trial, sentencing, and appeal proceeded smoothly, efficiently, and timely regardless of petitioner's unexplained absence.

While it is true that Ortega-Rodriguez seems to concern itself with flight before appeal, see Kivett v. State, 629 So.2d 249 (Fla. 3d DCA 1993), its rationale is equally applicable to petitioner's case because the appellate process was never significantly or materially disrupted. Indeed, as pointed out earlier, prior to the finalization of petitioner's opinion by the district court of appeal, petitioner had returned to the custody of the Bay County officials.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should answer the certified question in the affirmative and find that under the circumstances of this case petitioner's appeal in the district court should be reinstated.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 28th day of October, 1998.

Respectfully submitted,

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