IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 95,738
	)	
LARRY LAMAR GAINES,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

BERNARD S. FERNANDEZ
Assistant Public Defender
Florida Bar No. 0746975
Attorney for Larry Lamar Gaines

TABLE OF CONTENTS

AUTHORITIES CITED

CASES PAGE

PRELIMINARY STATEMENT

Respondent, Larry Lamar Gaines, was the defendant and Petitioner the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Before the Fourth District Court of Appeals, Respondent was Appellee, and Petitioner was Appellant. In the brief, the respective parties will be identified as they appear before this Court.

The following symbol will be used:

"R" Record on Appeal

“T” Transcript on Appeal.

“IB” Petitioner’s Initial Brief.

CERTIFICATE OF TYPE AND SIZE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2 (d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Respondent hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that has 10 characters per inch.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in Petitioner's initial brief as fair and correct, and will refer to any additional facts as necessary for the issues on appeal.

SUMMARY OF THE ARGUMENT

Point I

Respondent cannot be retried on the current charge. Jeopardy attached upon the swearing of the jury. No motion for mistrial was made on behalf of Respondent, nor was the dismissal occasioned by the defense. The instant appeal is moot, and therefore, should be dismissed.

Point II

The Fourth District Court of Appeals correctly found the trial court's order suppressing the cocaine as non final in nature. Neither the rules of appellate procedure, nor statue, allows Petitioner to appeal from a non final order.

ARGUMENT

POINT I

DOUBLE JEOPARDY PROHIBITS THE RETRIAL OF RESPONDENT, THEREFORE, THE INSTANT APPEAL IS MOOT

Both the Florida and Federal Constitutions provide an accused with strong protections against double jeopardy[1]. The United States Supreme Court has held double jeopardy attaches in a jury trial when the jury is empaneled and sworn, Serfass v. United States,420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265. Florida courts have long recognized the same, i.e., "[t]he fifth amendment clearly prohibits placing any person in jeopardy of life or limb twice for the same offense. Likewise, the law is well settled that jeopardy attaches when the jury is impaneled and sworn in.", Raska v.Burk, 436 So.2d 255, 256 (Fla. 4th DCA 1983), quoting Crist v. Bretz, 437 U.S.28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978), [additional citations omitted].

However, the constitutional protections afforded by the double jeopardy clauses are not absolute. See: e.g., Illinois v. Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), United States v. Wilson,420 U.S. 332, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975), United States v. Scott, 437 U.S.82, 98 S.Ct. 2187, 57

[1] Article I, §3, Florida Constitution; Fifth Amendment, Federal Constitution. See also: Fla.R.Crim.P.3.191(C).

L.Ed.2d 65 (1978). Petitioner contends the prohibition against double jeopardy does not prevent retrial of Respondent in the instant case. "Indeed since Defendant's conduct, i.e., his belated ore tenus motion made to suppress after the State had rested its case at trial, was the sole cause of the trial court's dismissal of the charge against Defendant, the State should not fairly be foreclosed from appealing the instant order suppressing evidence and dismissing the case (IB9,10). Respondent strongly disagrees.

A review of the trial transcript at the conclusion of Petitioner's case reveals the following:

> MR. MASERANG: The defense would also move for a judgment of acquittal, arguing that this evidence should be suppressed. I realize this isn't timely in the sense of having a motion to suppress hearing, but just based on the evidence that's come out today, the officers, without any probable cause to believe that Mr. Gaines was doing anything other than not wanting to talk to them, pursued him into a yard where they allege that he made a gesture and later cocaine was recovered that was thrown, that throwing gesture was made, according to what the officers state...The defense would further argue that simply looking at the jury instruction regarding possession of cocaine, that the State has not made a prima facie case such that Mr. Gaines could be found guilty based on looking at the evidence in the light most favorable to the State.
> THE COURT: except that I want to hear the State's response to the issue about whether the officers had any grounds for pursuing the defendant in the first place, which is really

> mentioned in the rubric of the motion to suppress. So what says the State as to that?
> STATE: The State's response, the State is very surprised that in the middle of a trial the motion to suppress is raised without any prior notice...
> THE COURT: Okay. Any rebuttal argument as to that?
> DEFENSE: First, regarding the timeliness, I believe the Florida Supreme Court says that a motion to suppress is timely even during trial (T60,61).

The trial court subsequently granted Respondent's motion to suppress, and dismissed the jury (T64,70). A written order followed (R39).

"The double jeopardy prohibition against a criminal defendant being repeatedly tried for the same offense includes a defendant's right to have his trial completed by the first jury impaneled. Where the court declares a mistrial *sua sponte* or at the request of the prosecution, mistrial must be the result of 'manifest necessity', for the defendant to be subject to retrial.", State v. Butler, 528 So.2d 1344, 1345(Fla. 2nd DCA 1988), quoting State v. Collins, 436 So.2d 147 (Fla. 2d DCA 1983). See also: C.A.K. v. State, 661 So.2d 365 (Fla. 2nd DCA 1995). Aside from initially raising, *ore tenus*, the motion to suppress during his motion for judgment of acquittal, the defense did nothing to invite error, nor did he ask for mistrial.

Respondent candidly admits that defense counsel's motion to suppress was untimely raised. However, an error by counsel in advising a judge of the law or procedure does not absolve the trial court of its responsibility to find an appropriate response. See: Rodriguez v. Burke, 637 So.2d 317 (Fla. 4th DCA 1994), wherein the court granted defendant's petition for writ of prohibition. In so doing, the court noted:

> [m]ore appropriate concerns are whether the trial judge was 'led' into error, and if so, by whom. Defense counsel initially gave an incorrect response to the trial court's initial question about the effects of a mistrial; the state's negligent preparation occasioned the problem... The prosecutor's stipulation to a mistrial, combined with defense counsel's erroneous response about its effect, contributed to the *sua sponte* declaration of mistrial and its double jeopardy consequence. *Having said that, the fact remains that the trial court disregarded or failed to act upon the alternatives of recess and exclusion of evidence.*

Rodriguez, 317 So.2d at 319 [emphasis added]. The same principle is applicable in the instant appeal. Because there was no "invited error" on behalf of Respondent when the trial court dismissed his charges, this Court should find that jeopardy attached, and, therefore, dismiss Petitioner's appeal as moot.

POINT II

THE LOWER COURT CORRECTLY RULED §924.07(1)(l), FLA.STAT. (1993) UNCONSTITUTIONAL THE TRIAL COURT'S ORDER WAS NON FINAL IN NATURE, AND THEREFORE, COULD BE APPEALED ONLY TO THE EXTENT PROVIDED BY THE SUPREME COURT

In the case at bar, on motion for rehearing, the Fourth District Court of Appeals ruled §924.07(1)(l)[2], Fla.Stat. (1993) unconstitutional. The appellate court explained its rationale as follows: "[t]he provision, which became effective in 1993, violates Article V, §4(b)(1) of the Florida Constitution, which vests exclusive power in our supreme court to authorize non-final appeals... There is nothing in the Florida Constitution which authorizes the legislature to allow review of non final orders by district courts of appeal.", State v. Gaines, 731 So.2d 7 (Fla. 4th DCA 1999).

In his initial brief, Petitioner urges this Court to treat the trial court's order suppressing the cocaine Respondent abandoned as final(IB7,8). Were this so, the District Court of Appeal would have jurisdiction[3]. However, a closer examination reveals that the

[2] The State may appeal from: an order or ruling suppressing evidence or evidence in limine at trial.

[3] "District Courts of Appeal have jurisdiction to review by appeal three classes of orders of trial courts: (1) final orders as described in Florida Rule of Appellate Procedure 9.030(b)(1)(A)...", State v. Saufey, 574 So.2d 1207, 1210 (Fla. 5th DCA 1991)(en banc), J. Cowart concurring.

trial court's order was actually non-final in nature, and hence not appealable by Petitioner. The appellate jurisdiction of district courts of appeal is delineated by the Florida Constitution in the following fashion:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court. *Art. V, §4(b)(1), Fla. Const.*

Article V, § 4(b)(1) provides that the appellate jurisdiction of the district courts to review final orders is conferred by statute, while the authority to review non final orders emanates from rules promulgated by the Florida Supreme Court. See: R.J.B. v. State, 408 So.2d 1048, 1050 (Fla. 1992); State v. Creighton, 469 So.2d 735, 740 (Fla. 1985).

To be appealable as a final order under Fla.R.App.P. 9.030(2)(b)(1)(a), the order must end the judicial labor in the cause, State v. Saufley, 574 So.2d 1207, 1211 (Fla. 5th DCA 1991).

The trial court's order read as follows:

> 1) The motion for Judgment of Acquittal is denied
> 2) The Motion to Suppress Evidence is granted. The Court finds, pursuant to POPPLE v. STATE, 626 So.2d 185 (Fla. 1993), that the detention of the defendant was invalid and that the recovered contraband was thus fruit of the poisonous tree.
> 3) An Order dismissing the case is hereby entered. (R35).

As the court in Saufley noted, "[u]nfortunately, when it comes to drafting orders, all lawyers and trial judges are not perfect.", Saufley, at 1208. Once it granted Respondent's motion to suppress the cocaine, the trial court was left with no other logical alternative but to also grant the motion for judgment of acquittal.

Instead, however, the trial court "dismissed" the case, thus giving rise to the inaccurate impression that the order suppressing the evidence was a final one. Thus, to have properly ended the judicial labor, the trial court needed to enter a motion for judgment of acquittal when it suppressed the cocaine. Fortunately, the appellate court correctly identified the trial court's order as non final and hence unappealable. The ruling of the Fourth District Court of Appeals should, therefore, be upheld.

CONCLUSION

This Court should affirm the lower court's reasoning, and dismiss the State's appeal as moot.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 Third Street/6th Floor
West Palm Beach, Florida 33401
(561) 355-7600

BERNARD S. FERNANDEZ
Assistant Public Defender
Florida Bar No. 0746975

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Douglas J. Glaid, Assistant Attorney General, Department of Legal Affairs, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, by mail this _____ day of September, 1999.

_____
Attorney for Larry Lamar Gaines