IN THE SUPREME COURT OF FLORIDA

RONALD COTE, :

Petitioner, :

vs. : CaseSC00-1327
No.
STATE OF FLORIDA,
:
Respondent.
:

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

RICHARD P. ALBERTINE, JR.
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 365610

Public Defender's Office
Polk County Courthouse
P.O. Box 9000-PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

TABLE OF CITATIONS (continued)

ARGUMENT

ISSUE I

WHETHER THE COURT THE SECOND DISTRICT COURT OF APPEAL'S DECISION IN COTE V. STATE, 760 SO. 2D 162 (FLA. 2D DCA), REH'G DENIED, (MAY 8, 2000), (2-1 DECISION)(FULMER, ACJ, DISSENTING), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IN N.T. V. STATE, 682 SO. 2D 688 (FLA. 5TH DCA 1996) ON THE SAME QUESTION OF LAW AS TO WHETHER PROSECUTION AND PUNISHMENT FOR BOTH INDIRECT CRIMINAL CONTEMPT IN THE CIRCUIT COURT, JUVENILE DIVISION, AND A VIOLATION OF COMMUNITY CONTROL IN THE CIRCUIT COURT, CRIMINAL FELONY DIVISION, BASED ON THE SAME CONDUCT VIOLATED CONSTITUTIONAL GUARANTEE AGAINST DOUBLE JEOPARDY SUCH THAT THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO DISMISS?

Petitioner, RONALD COTE, continues to rely on the facts, arguments, and citations to legal authorities set out in his initial brief on the merits but takes this opportunity to reply to Respondent's answer brief on the merits. Prior to that, however, Petitioner corrects his initial brief on the merits regarding the standard of review and a citation of a case where party names were reversed. The standard of review to be used by this Court in reviewing Petitioner's case may be de novo review rather than abuse of discretion since in Petitioner's case the motion to dismiss appears to have

been denied based on a question of law. See Execu-Tech Business Systems, Inc. v. New Oji Paper Co. Ltd, 752 So. 2d 582, 584 (Fla. 2000); Andrews v. Florida Parole Comm'n, 768 So. 2d 1257, 1260 (Fla. 1st DCA 2000); Vaughn v. State, 711 So. 2d 64 (Fla. 1st DCA 1998), wherein the court observed:

> In Brown, the court said that a trial judge's decision regarding dispositiveness may be overturned on appeal "only upon a showing of a clear abuse of discretion." Id. at 385. However, this presumes application of the correct legal rule. See Walter v. Walter, 464 So. 2d 538, 539 (Fla. 1985) ("[t]he correction of an erroneous application of law and the determination that the trial court abused its discretion are two separate and distinct appellate functions"). Review of whether the trial court has applied the correct legal rule is de novo, because application of an incorrect rule is erroneous as a matter of law. See Files v. State, 613 So. 2d 1301, 1304 (Fla. 1992).

Vaughn v. State, 711 So. 2d at 66, citing Brown v. State, 376 So. 2d 382, 384 (Fla. 1979). Similarly, in Petitioner's case, review should be de novo rather than abuse of discretion regarding whether the Second District Court of Appeal and the trial court applied an incorrect rule of law which would be erroneous as a matter of law. Petitioner also corrects errant citations to State v.

King, 426 So. 2d 12 (Fla. 1982) in his initial brief wherein names of parties were inadvertently reversed to King v. State. See Petitioner's Initial Brief on Merits, No. SC00-1327 at 26-29, 40-42.

THIS COURT'S CONFLICT JURISDICTION

Respondent's assertion that conflict jurisdiction does not exist between Petitioner's case and N.T. v. State, 682 So. 2d 688 (Fla. 5th DCA 1996) because the facts are significantly different is without legal merit. When a circuit court in Florida, having subject matter and personal jurisdiction, places a citizen in legal jeopardy through prosecution multiple times and imposes multiple punishments based on the same conduct, double jeopardy principles guaranteed by the state and federal constitutions are violated, irrespective of the fact that such violation may have occurred in one or more divisions of the same circuit court as in Petitioner's case. Contrary to Respondent's answer, therefore, the Second District Court of Appeal's decision in Cote v. State, 760 So. 2d 162 (Fla. 2d DCA), reh'g denied, (May 8, 2000),

expressly and directly conflicts with the Fifth District Court of Appeal's decision in N.T. v. State, 682 So. 2d 688 (Fla. 5th DCA 1996) on the same question of law as to whether prosecution and punishment for both indirect criminal contempt in the circuit court, juvenile division, and a violation of community control in the circuit court, criminal felony division, based on the same conduct violated constitutional guarantees against double jeopardy contained in the double jeopardy clauses of the Florida and federal constitutions.

While agreeing that double jeopardy principles were properly applied in N.T. v. State to prohibit multiple prosecution and punishment based on the same conduct where the multiple prosecution and punishment had occurred in the same division of the circuit court, Respondent contends that the juvenile division had "no authority" to prosecute and punish Petitioner for indirect criminal contempt such that the juvenile division's actions in that regard were rendered void. Contrary to Respondent's position, even if the juvenile division had "no authority," any prosecution and

punishment that occurred therein was merely voidable and not void since the circuit court had subject matter jurisdiction over felonies in the state of Florida such that the state, by failing to timely object, waived the ability to void the juvenile division's actions due to any lack of authority by the juvenile division to prosecute and punish the juvenile for indirect criminal contempt under circumstances as presented in Petitioner's case where the juvenile who had been direct filed and prosecuted as an adult in the criminal felony division, had entered a plea of nolo contendere after which adjudication and sentencing was withheld therein, in favor of adjudication as a juvenile delinquent with juvenile disposition under the provisions of Chapter 39, Florida Statutes.

While recognizing that the facts in N.T. v. State, wherein the prosecution and punishment of violation of community control and indirect criminal contempt based on the same alleged conduct occurred in the same juvenile division of the circuit court, are distinguishable from the facts in Petitioner's case, Cote v. State, wherein

prosecution and punishment for indirect criminal contempt occurred in the juvenile division while prosecution and punishment of violation of community control occurred in the felony division, both based on the same conduct, the factual distinction regarding both prosecutions having occurred in the juvenile division as opposed to one having occurred in the juvenile division while the other occurred in the felony division was of no material legal consequence, contrary to Respondent's answer, to whether prosecution and punishment for both indirect criminal contempt and violation of community control in the circuit court based on the same conduct violated Petitioner's constitutional guarantees and prohibitions against double jeopardy for multiple prosecutions and punishments based on the same conduct, inasmuch as the circuit court undeniably had subject matter jurisdiction over the matter irrespective of whether prosecuted and punished in the juvenile division or the felony division of the circuit court. See Art. V, § 3, 20, Fla. Const.; § 985.201, Fla. Stat. (1997); § 39.022, Fla. Stat. (1997); § 26.012(2)(c), (2)(d), Fla. Stat. (1997). The

fact that the juvenile division of the circuit court, i.e., that juvenile division judge, may not have had legal authority to prosecute and punish the youth under the circumstances presented in Petitioner's case merely made the actions of prosecution and punishment for indirect criminal contempt in the juvenile division voidable but not void, contrary to the Second District Court of Appeal's decision and Respondent's answer, since the circuit court had subject matter jurisdiction over Petitioner at the time. By inaction and failure to object at the time of the prosecution and punishment by the juvenile division in Petitioner's case, the state waived any ability to void the juvenile division's prosecution and punishment of Petitioner undertaken with "no authority" such that similar to N.T. v. State, multiple prosecutions and punishments based on the same conduct violated double jeopardy principles of both state and federal constitutions. see U.S. Const. amend. V; Art. I, § 9, Fla. Const.

Thus, this Court should exercise discretionary jurisdiction, pursuant to Fla. R. App. P.

9.030(a)(2)(A)(iv), review Petitioner's case on the merits, quash the Second District Court of Appeal's decision, and, thereafter, reverse the trial court's orders denying Petitioner's motion to dismiss, revoking his community control, and sentencing him to 72 months in prison suspended in lieu of 2 years community control followed by 5 years of probation, after which the original juvenile adjudication of delinquency and disposition should be reimposed in case 97-670-F, together with credit for time served on community control and probation in the interim.

MERITS OF RESPONDENT'S ANSWER REGARDING PETITIONER'S CLAIM

Respondent's recitation of Florida constitutional provisions and statutes in support of the contention that the juvenile division of the circuit court in Florida had "no authority" to consider a case under the circumstances presented by Petitioner's case serves to underscore the legal distinction between lawful divisional authority of the circuit court, sometimes mistakenly referred to as

"divisional authority jurisdiction" which can be waived and which results in voidable judgments when entered by courts without lawful divisional authority over a particular case as distinguished from subject matter jurisdiction of the circuit court, meaning jurisdiction over a particular class of cases, which cannot be waived or conferred by agreement and which results in void judgments when entered by courts without such jurisdiction. See State v. Griffith, 675 So. 2d 911, 913 (Fla. 1996); State v. King, 426 So. 2d 12, 14 (Fla. 1982).

Chapter 985, Florida Statutes became effective in Oct. 1, 1997, and applied to crimes committed after that date which was several months after the date, Feb. 19, 1997, that Petitioner allegedly committed the crime charged in his case and several weeks after the date, July 24, 1997, Petitioner entered his plea of no contest in the felony division after which the felony division of the circuit court, on Aug. 26, 1997, withheld adjudication as an adult, and, instead, in the juvenile division, adjudicated Petitioner delinquent, and sentenced him as

a juvenile to be committed to the Department of Juvenile Justice, level 8 facility, with post commitment community control for an indeterminate period of time not to exceed nineteenth birthday, as per the commitment order signed Sept. 18, 1997, in the juvenile division, all pursuant to provisions of Chapter 39, Florida Statutes, the juvenile justice statute in effect at the time. (V1, R20-21, 22-26, 29-30).

Under § 39.022(1), Fla. Stat. (1995) and § 985.201(1), Fla. Stat. (1997), the circuit court has exclusive original jurisdiction in the circuit court over proceedings in which a child is alleged to have committed a delinquent act or violation of law. Born March 31, 1980, Petitioner, a juvenile under the age of eighteen, had been direct filed against on March 7, 1997, for allegedly having committed burglary of dwelling with assault or battery in case number 97-670-F on Feb. 19, 1997. (V1, R01-02). Although direct filed in adult court where the felony division withheld adjudication therein after Petitioner had pleaded no contest on July 24, 1997, Petitioner was adjudicated delinquent and sentenced as a

juvenile on Aug. 26 & Sept. 18, 1997, (V1, R20-21, 23-26, 29-30), under the provisions of § 39.052, Fla. Stat. (Supp. 1996); §§ 39.054, 39.059, Fla. Stat. (1995). See §§ 39.052(3)(a)5a(XI), (3)(a)5b(I), (3)(a)5d, 3(b), and (3)(c), Fla. Stat. (Supp. 1996); §§ 39.059(1)-(4), (6), and (7)(a) and (7)(e), Fla. Stat. (1995); see also § 39.054, Fla. Stat. (1995), as to powers of disposition available to the court after determining not to impose youthful offender or adult sanctions under § 39.059(7)(e), Fla. Stat. (1995) as appears to have occurred in Petitioner's case. Unlike § 985.233(4)(e), Fla. Stat. (1997) set out in Chapter 985, effective Oct. 1, 1997, Chapter 39, Florida Statutes, had no counterpart, particularly, § 39.059(6), Fla. Stat. (1995), as to further proceedings involving sanctions being heard in adult court, the felony division, after a child has been sentenced to juvenile sanctions although § 39.052(3)5d provided:

> d. Once a child has been transferred for criminal prosecution pursuant to information and has been found to have committed the presenting offense or a lesser included offense, the child shall be handled thereafter in every respect as

> if an adult for any subsequent violation of state law, unless the court imposes juvenile sanctions under s. 39.059(6).

§ 39.052(3)5d, Fla. Stat. (Supp. 1996); see § 985.227(3)(a), Fla. Stat. (1997):

> (3) Effect of direct file.--
> (a) Once a child has been transferred for criminal prosecution pursuant to an information and has been found to have committed the presenting offense or a lesser included offense, the child shall be handled thereafter in every respect as if an adult for any subsequent violation of state law, unless the court imposes juvenile sanctions under s. 985.233.

§ 985.227(3)(a), Fla. Stat. (1997). Pursuant to the last phrase in § 39.052(3)5d, Fla. Stat. (Supp. 1996), "unless the court imposes juvenile sanctions under s. 39.059(6)," and § 985.227(3)(a), Fla. Stat. (1997), "unless the court imposes juvenile sanctions under s. 985.233," the juvenile division had jurisdiction over Petitioner when initially sentenced under the above provisions of Chapter 39, Florida Statutes, certainly until, Oct. 1, 1997, the effective date of § 985.233(4)(e), Fla. Stat. (1997); and arguably after that according to § 985.227(3)(a), Fla. Stat. (1997), which closely tracks the language of § 39.052(3)5d, Fla. Stat. (Supp. 1996). While concluding

that § 985.227(3), Fla. Stat. (1997), controls in Petitioner's case to the extent that "it was the Juvenile Division's responsibility to transfer Petitioner's file to the Felony Division once the initial Petition alleging violation of the Petitioner's community control was filed with the clerk's office," which appeared to have occurred in Petitioner's case, Respondent ignores the obvious fact that the state filed the petition for violation of community control/post commitment community control in the circuit court on Aug. 7, 1998, requesting that the juvenile division take jurisdiction of Petitioner's case just days after the juvenile division had prosecuted and punished Petitioner for indirect criminal contempt. (V1, R32-34, 49-52, 56). Both Chapter 985, Florida Statutes, § 985.216(1), Fla. Stat. (1997), and Chapter 39, Florida Statutes, § 39.0145(1), Fla. Stat. (1995), provided lawful authority to "the court" to "punish any child for contempt for interfering with the court or with court administration, or for violating any provision of this chapter or order of the court relative thereto." See § 985.03(15), Fla. Stat. (1997); § 39.01(18), Fla. Stat.

(1995), defining "court" as "unless expressly stated, means the circuit court assigned to exercise jurisdiction under this chapter." Since Petitioner had been adjudicated delinquent and given juvenile sanctions, pursuant to the juvenile division commitment order to Department of Juvenile Justice and aftercare probation including post commitment community control, arguably, the juvenile division had lawful authority or "divisional authority jurisdiction" to enforce the juvenile sanctions in Petitioner's case through indirect criminal contempt proceedings and did so without objection by the state. (V1, R29-30).

Moreover, even if the juvenile division did not have jurisdiction over Petitioner's case at the time of the violations of post commitment community control, pursuant to § 985.233(4)(e), Fla. Stat. (1997), prosecution and punishment of Petitioner for indirect criminal contempt with accompanying punishments in the juvenile division resulted in voidable judgments and sentences, as opposed to void judgments and sentences, such that objection by the state was required at the time of the indirect

criminal contempt proceedings in the juvenile division in order to not waive the objection. See State v. Griffith, 675 So. 2d 911, 913 (Fla. 1996); State v. King, 426 So. 2d 12 (Fla. 1982), wherein this Court held:

> This Court has long recognized a distinction between judgments that are void and those that are voidable. Objections to a void judgment can be raised at any time, whereas objections to a voidable judgment must be timely made. Malone v. Meres, 91 Fla. 709, 109 So. 677 (1926). "If the court has acquired jurisdiction of the subject-matter and of the parties, the judgment or decree entered is binding, even though erroneous because of irregularity of procedure, and such judgment or decree will not be set aside, reversed, or modified, except by appropriate direct appellate procedure." 91 Fla. at 720, 109 So. at 682. If a court has jurisdiction of the subject matter and of the parties, the proceeding is not a nullity and the judgment is not void.
>
> In this case the trial court had jurisdiction of the subject matter and of the parties. It had jurisdiction of the subject matter because it is a circuit court which has jurisdiction of all felonies. § 26.012(2)(d), Fla. Stat. (1981). As for any objections King may have had as to the court's jurisdiction over his person, he waived them by appearing in person and defending his case. Haddock v. State, 129 Fla. 701, 176 So. 782 (1937); Tillman v. State, 58 Fla. 113, 50 So. 675 (1909).

State v. King, 426 So. 2d at 14. Similarly, in Petitioner's case, since the circuit court had subject

matter jurisdiction over felonies, as in Petitioner's case, any irregularities in the juvenile division court's jurisdiction or exercise of authority over Petitioner or his case regarding indirect criminal contempt proceedings held therein and punishments based thereon were waived by the state by not timely objecting to the juvenile division court accepting Petitioner's guilty pleas as to petitions and orders to show cause for indirect criminal contempt. (V1, R29-30, 47, 49, 52, SV3, R133, SV4, R140, R143). See Turner v. State, 769 So. 2d 1108, 1109 (Fla. 2d DCA 2000); State v. J.S., 716 So. 2d 865, 866-867 (Fla. 5th DCA 1998); Miller v. State, 702 So. 2d 617, 618-619 (Fla. 4th DCA 1997). In Petitioner's case, the state stood silent, never objecting when Judge Dubensky adjudicated Petitioner delinquent and imposed juvenile sanctions, including the commitment order to the Department of Juvenile Justice and post commitment community control in the juvenile division of the circuit court; nor, did the state object when the juvenile court, Judge Brownell, accepted Petitioner's pleas as to the petitions and show cause orders for indirect criminal

contempt for violations of his post commitment community control order in case number 97-670-F which included violations factually similar to those alleged by the state in the petition for violation of community control/post commitment community control filed in felony division against Petitioner. (V1, R29-30, 47, 49, 52, SV3, R133, SV4, R140, 143).

This Court, in Lisak v. State, 433 So. 2d 487 (Fla. 1983), construed §§ 39.06(7) and 39.02(5)(c), Fla. Stat. (1979), to prohibit a plea of guilty, as a juvenile delinquent act, within twenty-one days of the minor's arrest for a capital offense unless agreed to by the state such that the plea entered in the juvenile division without agreement by the state was a nullity. Contrary to Respondent's answer, Lisak v. State, 433 So. 2d 487 (Fla. 1983) does not stand for the propositions that; one, where there is no statutory authority giving the juvenile division jurisdiction to accept a plea, the plea is a nullity; and two, the state's silence at entry of such plea is of no legal significance as to not constitute waiver since the juvenile division acted

without jurisdiction once jurisdiction has been transferred from the juvenile division to the felony division so that any attempt by the juvenile division to impose sanctions such as indirect criminal contempt as in Petitioner's case would be void since "jurisdiction" remained with the felony division. See Respondent's Answer Brief on Merits, No. SC00-1327 at 16-17); see also Williams v. State, 742 So. 2d 496, 498 (Fla. 1st DCA 1999).

Instead, Petitioner's case appears to be the reverse scenario of State v. Griffith and State v. King so that the same principles of law applied in those cases should apply in Petitioner's case. When Petitioner was prosecuted for indirect criminal contempt for having violated his juvenile sanctions, the proceedings, arguably, should have been conducted in the felony division, not the juvenile division of the circuit court. While both the juvenile division judge and the felony division judge were circuit judges, the circuit court had subject matter jurisdiction over criminal felony proceedings. See Cobb v. State ex. rel. Hornickel,

134 Fla. 315, 187 So. 151 (Fla. 1939), "Jurisdiction of the subject matter" means the power of the court to adjudicate the class of cases to which the particular case belongs (citations omitted). Id., 134 Fla. at 324, 187 So. at 155; see also Art. V, § 3, 20, Fla. Const.; § 985.201, Fla. Stat. (1997); § 39.022, Fla. Stat. (1997); § 26.012(2)(c), (2)(d), Fla. Stat. (1997). Thus, the juvenile division court's judgments of indirect criminal contempt and punishments imposed in Petitioner's case were not void for lack of subject matter jurisdiction, albeit, they may have been voidable, in which case timely objection was required by the state, which had not been forthcoming when the indirect contempt proceedings and punishments were imposed. See Cote v. State, 760 So. 2d at 166.

Unlike in State v. Griffith and State v. King, however, the state, not Petitioner, sought to set aside the voidable judgments after the fact, after Petitioner had filed his motion to dismiss, such that the state, not Petitioner, had waived the ability to void the voidable judgments and sentences by failing to object at the time

of the first prosecution and punishments imposed by the juvenile division pursuant to the indirect criminal contempt orders. Unlike State v. Griffith and State v. King, wherein there had been a single prosecution and conviction and the defendant was seeking to overturn the conviction, Petitioner sought to set aside the second prosecution and second sanction imposed on him based on a single offense or same conduct, which were both contrary to the protections promised by the double jeopardy clause, see U.S. Const. amend. V; Art. I, § 9, Fla. Const.; N.T. v. State, 682 So. 2d 688 (Fla. 5th DCA 1996), under which Petitioner had timely asserted his right to in the trial court. The state could have objected to the indirect criminal contempt proceeding in the juvenile division of the circuit court in order to preserve its authority to prosecute Petitioner's alleged violation of his juvenile sanction in the felony division based on the same conduct but, instead, stood silent as the youth was prosecuted and punished for indirect criminal contempt in the juvenile division of the circuit court. Accordingly, the state waived its

challenge to the juvenile indirect contempt judgments by failing to object to the proceedings in the juvenile division and, therefore, the otherwise voidable indirect contempt judgments and punishments should have stood such that Cote's prosecution for both indirect criminal contempt in the circuit court, juvenile division, and a violation of community control in the circuit court, felony division, based on the same conduct violated his constitutional guarantee against double jeopardy. See N.T. v. State, 682 So. 2d 688, 689-691 (Fla. 5th DCA 1996). The trial court's erroneous denial of Petitioner's motion to dismiss was not harmless since the youth was substantially prejudiced thereby as he pleaded guilty to violations of community control based on the same conduct that he had been already prosecuted and punished in indirect criminal contempt proceedings.

CONCLUSION

Petitioner, RONALD COTE, based on the facts, arguments, and citations to legal authorities presented in his initial and reply briefs on the merits, respectfully, requests that this Court exercise discretionary jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), and grant the relief requested therein.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Timothy A. Freeland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 801-0600, on this _____ day of August, 2001.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
365610
(863) 534-4200

RICHARD P. ALBERTINE, JR.
Assistant Public Defender
Florida Bar Number

P.O. Box 9000-PD
Bartow, FL 33831

RPA/dlc