

IN THE SUPREME COURT OF FLORIDA

JAMES FRANK PIZZO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC05-1951

DCA NO.: 2D03-4913

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In Pizzo v. State, 30 Fla. L. Weekly D1769 (Fla. 2nd DCA, July 22, 2005) the Second District set forth the following pertinent facts:

James Frank "Jimmy" Pizza seeks review of his judgment and sentence for five counts of mortgage fraud, six counts of grand theft, and one count each of organized fraud, conspiracy to commit racketeering, and racketeering, which arose out of the operation of his family-owned home improvement business. We affirm Mr. Pizzo's conviction for racketeering. Because the jury instructions regarding mortgage fraud and conspiracy to commit racketeering were fundamentally erroneous, we reverse those convictions and remand for a new trial. We also reverse Mr. Pizzo's convictions for grand theft and organized fraud because dual convictions for those charges violate the prohibition against double jeopardy. Thus, on remand the trial court must grant a judgment of acquittal on the lesser of the two charges.

Defense counsel did not object to the oral delivery of the mortgage fraud instructions, but we conclude that the error was fundamental as it pertained to the mortgage fraud counts because it "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained

without the assistance of the alleged error.' " Globe v. State, 877 So. 2d 663, 677 (Fla. 2004) (quoting Lawrence v. State, 831 So. 2d 121, 137 (Fla. 2002)). We note that the oral delivery of the remainder of the instructions was adequate. Accordingly, we reverse Mr. Pizzo's convictions for mortgage fraud and remand for a new trial on those charges.

The use of the conjunction and/or allowed for a conviction of Mr. Pizzo based solely on a determination that either his wife, Rozlyn, or his father, James, "knowingly and willfully became a member of such conspiracy" "with the specific intent either to personally engage in at least two incidents of racketeering" or "to otherwise participate in the affairs of the 'enterprise' with the knowledge and intent that other members of the conspiracy would engage in at least two incidents of racketeering." The trial court therefore committed fundamental error in instructing the jury on the crime of conspiracy to commit racketeering. Accordingly, we reverse Mr. Pizzo's conviction for conspiracy to commit racketeering and remand for a new trial on the charge.

Mr. Pizzo was convicted of grand theft and organized fraud based on contracts homeowners entered into for home improvement with East Coast Exteriors. Convictions for both organized fraud and grand theft that are based on common allegations violate the

constitutional prohibition against double jeopardy. Cherry v. State, 592 So. 2d 292, 294-95 (Fla. 2d DCA 1991); Donovan v. State, 572 So. 2d 522, 525 (Fla. 5th DCA 1990). Although Mr. Pizzo did not preserve this issue for review, a double jeopardy violation is considered fundamental error. See Gisi v. State, 848 So. 2d 1278, 1281 (Fla. 2d DCA 2003). Moreover, the State concedes error on this issue.

Ordinarily, we would reverse the lesser of the offenses and affirm the greater. See Cherry, 592 So. 2d at 295; Donovan, 572 So. 2d at 526. However, in this case there are six counts of grand theft, a third-degree felony, and one count of organized fraud, a first-degree felony. Therefore, we are unable to determine which is actually the "lesser" of the offenses. Accordingly, we reverse Mr. Pizzo's grand theft and organized fraud convictions and remand for the trial court to a grant judgment of acquittal on the lesser of the offenses.

SUMMARY OF THE ARGUMENT

Petitioner argues that this Court may exercise its jurisdiction to review the issue raised by Petitioner. However, Respondent submits that the Second District's opinion in Pizzo v. State is not ripe for review where the Petitioner's case has been remanded for a new trial on five counts of mortgage fraud and one count of conspiracy to commit racketeering which include predicate acts which could be used as predicate acts for the purposes of upholding the Petitioner's racketeering conviction and sentence.

This Court should not exercise its jurisdiction in the instant when the underlying case is not final, as the case is not ripe for review in light of the non-final status of the underlying convictions. This Court's exercise of jurisdiction is appropriate only as a means of attacking a final judgment of a lower tribunal. Where the judgment is not final then appeal will not lie. The order of the lower tribunal has no element of finality where the propriety of the Petitioner's conviction and sentence for racketeering, for which the Petitioner is asking this Court to reverse, can not be determined until after the Petitioner's case is remanded for a new trial on the five counts of mortgage fraud and one count of conspiracy to commit racketeering. Accordingly, Respondent respectfully requests

this Court to deny review of the instant case.

ARGUMENT

WHETHER THIS COURT SHOULD GRANT REVIEW OF
DISTRICT COURT OPINION WHERE THE UNDERLYING
CONVICTIONS AND SENTENCES ARE NON-FINAL AND
THE ISSUES PRESENTED ARE NOT RIPE.

This Court should not exercise its jurisdiction in the instant when the underlying case is not final, as the case is not ripe for review in light of the non-final status of the underlying convictions. This Court's exercise of jurisdiction is appropriate only as a means of attacking a final judgment of a lower tribunal. Where the judgment is not final then review will not lie. The order of the lower tribunal has no element of finality where the propriety of the Petitioner's conviction and sentence for racketeering, which the Petitioner is asking this Court to reverse, can not be determined until after the Petitioner's case is remanded for a new trial on the five counts of mortgage fraud and one count of conspiracy to commit racketeering. Accordingly, Respondent respectfully requests this Court to deny review of the instant case.

The Petitioner would ask this Court to review the opinion of the Second District prior to the completion of the underlying case. The Second District held the jury instructions regarding mortgage fraud and conspiracy to commit racketeering were fundamentally erroneous, reversed those convictions, and

remanded for a new trial on those six counts. These six counts include predicate acts which would validate the Petitioner's conviction for racketeering. Any ruling as to the sufficiency of the predicate acts necessary to uphold the Petitioner's conviction for racketeering made prior to the new trial or other resolution in the trial court would be premature. Additionally, any ruling made prior to the completion of the proceedings in the trial court may result in fundamentally unreasonable result, invalidating a properly obtained conviction by the State after jeopardy has attached.

CONCLUSION

Respondent respectfully requests that this Honorable Court deny review of the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Bruce Rogow, Esquire, Suite 1930, 500 East Broward Boulevard, Fort Lauderdale, Florida 33394 and Beverly A. Pohl, Esquire, P.O. Box 14010, Fort Lauderdale Florida 33302, this 23rd day of November, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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