IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2225
Lower Tribunal No. 3D08-2892

MICHAEL HERNANDEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON THE MERITS

BILL McCOLLUM
Attorney General

RICHARD L. POLIN
Florida Bar No. 0230987
Chief Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE APPEAL FROM THE JUDGMENT AND SENTENCE SHOULD BE ENTERTAINED IN THE THIRD DISTRICT COURT OF APPEAL.

CONCLUSION 14

CERTIFICATE OF SERVICE 14

CERTIFICATE REGARDING FONT SIZE AND TYPE 15

TABLE OF CITATIONS

Case	Page
Cole v. State, 280 So. 2d 44 (Fla. 4th DCA 1973)	2,11-12
Stanek-Cousins v. State, 896 So. 2d 865 (Fla. 5th DCA 2005)	2,13
United States v. Dubon-Otero, 76 F. Supp. 2d 161 (D. Puerto Rico 1999)	12
United States v. Means, 409 F. Supp. 115 (D. N. Dak. 1976)	12
Vadilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994)	2,6-7,10

Other Authorities

Fla.R.App.P. 9.140(b)(3) 9

Fla.R.Jud.Admin. 2.260(b) 7

STATEMENT OF THE CASE AND FACTS

Michael Hernandez was charged with first degree murder and attempted first degree murder in the Eleventh Judicial Circuit. (R. 57-63). As a result of pretrial publicity, the Eleventh Judicial Circuit granted a motion for change of venue on June 30, 2008, and transferred the case to the Ninth Judicial Circuit. (R. 1941). The trial was then held in Orlando, in the Ninth Judicial Circuit, and a jury in the Ninth Judicial Circuit found the defendant guilty of first degree murder and attempted first degree murder on September 24, 2008. (R. 2168-69). The verdict forms bear the style of the Ninth Judicial Circuit, but retain the original case numbers from the Eleventh Judicial Circuit.

The judgments of conviction are dated September 24,2008, bearing file stamp dates of both September 24, 2008 and October 3, 2008, and bear the style of the Eleventh Judicial Circuit. (R. 2183-90).

Immediately after the jury verdict, on September 25, 2008, the trial court entered an order, in the name of the Eleventh Judicial Circuit, transferring venue back to the Eleventh Judicial Circuit, "effective immediately." (R. 2170). Sentencing proceedings then were conducted in Miami on November 7, 2008, in the Eleventh Judicial Circuit (R. 2192), and the

trial court, in the Eleventh Judicial Circuit issued its written sentences on November 7, 2008 and filed them on November 12, 2008, in the name of the Eleventh Judicial Circuit. (R. 2211-2214).

Additionally, after the transfer of the case back to the Eleventh Judicial Circuit, on October 3, 2008, the defendant filed a motion for new trial (R. 2171), a motion to arrest judgment (R. 2179) and a motion to direct verdict to a lesser included offense. (R. 2181). The motions were denied on October 29, 2008)(R. 2191).

A notice of appeal was then filed in the Eleventh Judicial Circuit, seeking review of the judgments and sentences in the Third District Court of Appeal. (R. 2203).

During the course of the appeal in the Third District, Hernandez filed a Motion to Transfer the Appeal to the Fifth District Court of Appeal, based on the decisions in Stanek-Cousins v. State, 896 So. 2d 865 (Fla. 5th DCA 2005), Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994), and Cole v. State, 280 So. 2d 44 (Fla. 4th DCA 1973). (R. 3152-55). The State filed a written response to the motion. (R. 3156-84). The Third District Court of Appeal denied the motion to transfer, and concluded "that jurisdiction lies with the Third District Court of Appeal because although the case was transferred from Miami-Dade County to Orange County for trial due to pretrial publicity, it was

then transferred back to Miami-Dade County immediately following the trial for the resolution of post-trial matters and the imposition of the judgment and sentence."

The Third District explained its conclusion as follows:

> Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994), is controlling. In Vasilinda, the Florida Supreme Court was asked to determine appellate jurisdiction for review of interlocutory and final orders entered by the trial court after venue is transferred in a criminal case. In answering the certified question, the Florida Supreme Court noted it is generally accepted "that when venue is transferred to another jurisdiction and the case is **concluded in the new jurisdiction,** review of the final order or judgment is properly commenced in the appellate court which has jurisdiction over the transferee court." Id. at 1085 (emphasis added). Additionally, the court concluded that "[a]ppellate jurisdiction is determined at the time the notice of appeal or petition for extraordinary writ is filed." Id. at 1087.
>
> Applying these clear and unambiguous holdings to the instant case, we conclude that appellate jurisdiction lies with the Third District Court of Appeal. Although venue was transferred to Orange County due to pre-trial publicity, and venue rested with the Fifth District Court of Appeal during pendency of the trial to rule on any interlocutory motions or petitions entered in Orange County, once the case was transferred back to Miami-Dade County and the Clerk of the Court in Miami-Dade County received the court file, Orange County lost jurisdiction and appellate jurisdiction was transferred to the Third District. This finding is further supported by the fact that post-trial motions, the issuance of the judgment and sentence, and the notice of

> appeal all occurred in Miami-Dade County after Orange County transferred the case back to and the file was received by Miami-Dade County. Because venue was transferred back to Miami-Dade County and the case was concluded in Miami-Dade County, review of the judgment is properly before the Third District Court of Appeal. . . .

The Third District certified conflict with the previously noted decisions in Cole and Stanek-Cousins. (R. 3185-88).

SUMMARY OF ARGUMENT

The District Court of Appeal properly concluded that the appeal should proceed in the Third District Court of Appeal. Although the jury verdicts were rendered in the Ninth Judicial Circuit, the case was immediately transferred back to the Eleventh Judicial Circuit, in accordance with applicable Rules of Judicial Administration, and was concluded in the Eleventh Judicial Circuit, with both post-trial motions and sentencing proceeding in the Eleventh Judicial Circuit. Under such circumstances, and in accordance with the principles set forth in Vasilinda v. Lozano, the appeal should proceed in the Third District Court of Appeal.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE APPEAL FROM THE JUDGMENT AND SENTENCE SHOULD PROCEED IN THE THIRD DISTRICT.

Although the jury verdicts were rendered in the Ninth Judicial Circuit, the case was immediately thereafter transferred back to the Eleventh Judicial Circuit, where post-trial motions and sentencing were conducted, and the judgments and sentences were then entered in the Eleventh Judicial Circuit, prior to the filing of the notice of appeal. Under such circumstances, the appeal should properly proceed in the Third District Court of Appeal.

In Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994), trial court venue in a criminal trial was transferred back from the Eleventh Circuit to the Nine Circuit. This Court entered an order appointing the Eleventh Circuit Judge as a circuit judge of the Ninth Circuit, for the purpose of trying the case. Prior to trial, the judge entered an order prohibiting the media from identifying the jurors publicly. Review of that order was sought in the Third District Court of Appeal, which transferred the case to the Fifth District, based on its appellate jurisdiction over the Ninth Judicial Circuit. The Fifth District expressed uncertainty as to which appellate court had

jurisdiction and certified the question to this Court. In the meantime, the trial proceeded and the defendant was acquitted.

Although the issue regarding the order affecting the media was moot, this Court addressed the venue question and stated "that when venue is transferred to another jurisdiction and the case in concluded in the new jurisdiction, review of the final order or judgment is properly commenced in the appellate court which has jurisdiction over the transferee court." 631 So. 2d at 1085 (emphasis added). By contrast, the instant case was "concluded" in the Eleventh Judicial Circuit, after the transfer back for post-trial and sentencing proceedings.

It is significant that the transfer back to the Eleventh Judicial Circuit was in accordance with provisions of Rule 2.260, Florida Rules of Judicial Administration, and that those provisions did not exist at the time of either Vasilinda or Cole. Rule 2.260(b) provides that "[t]he presiding judge from the originating court shall accompany the change of venue case, unless the originating and receiving courts agree otherwise." Thus, the presiding judge, from the Eleventh Judicial Circuit accompanied the case with both the original transfer, to the Ninth Judicial Circuit, and the subsequent transfer, back to the Eleventh Circuit. Additionally, Rule 2.260(g) added: "After the conclusion of the trial, the file shall be returned to the clerk

in the county of origin." That is exactly what transpired in the instant case.

In light of Rule 2.260 and the transfer back to the Eleventh Judicial Circuit, for post-trial and sentencing proceedings, the question then becomes which District Court of Appeal should entertain the appeal. Where the verdict emanates from the Ninth Circuit and the judgment, sentencing proceedings and sentence emanate from the Eleventh Circuit, an anomaly will exist under any decision regarding where the appeal should proceed. If the appeal proceeds in the Fifth District, that District will then end up reviewing a Ninth Circuit trial and verdict, and an Eleventh Circuit sentencing order and orders on post-trial motions over which it would typically not have any review capacity. Conversely, if the appeal proceeds in the Third District, it will end up reviewing an Eleventh Circuit jury verdict. Either way, there will be some form anomaly, with one District Court of Appeal reviewing a portion of the case adjudicated by a judicial circuit over which it has no supervisory appellate authority.

The third possibility, with one circuit issuing a verdict and another circuit issuing post-trial and sentencing orders, is that separate appeals would go to the two district courts of appeal, with each reviewing the acts of the circuit court within their appellate jurisdiction. While such an alternative would

not create an anomaly, as in the first two scenarios, it would be contrary to rules of procedure and would result in overlapping appeals, with the possibility of conflicting results. Rule 9.140(b)(3), Florida Rules of Appellate Procedure, contemplates a single, unified appeal from the judgment and sentence, as it authorizes the filing of the notice of appeal, as to both, within 30 days following the rendition of the sentence. Even if separate appeals were authorized by the rules of procedure, the absurdity of having two appeals in different appellate courts should be readily apparent. One court could affirm a sentence, while the other court overturns a conviction. Even apart from the potential for conflicting actions by the two appellate courts, the burden imposed on the appellate courts through two separate appeals should preclude any such course. Duplicate records on appeal would be required - a not insignificant factor in a first degree murder case with such as the instant one, where the combine record and transcripts are approximately 10,000 pages.

To the extent that some anomaly will exist, with one appellate court reviewing a portion of the work done by the judicial circuit outside of its territorial jurisdiction, the reasons for leaving the appeal with the appellate court where the trial court proceedings were concluded are strong and supported by Vasilinda.

First, that is where the trial court had jurisdiction at the time of the filing of the notice of appeal. That is of the utmost significance in light of the holding in Vasilinda that "[a]ppellate jurisdiction is determined at the time the notice of appeal or petition for extraordinary writ is filed." 631 So. 2d at 1087.

Indeed, Vasilinda expressly considered and contemplated that there would be anomalies where the court ultimately entertaining the appeal would be reviewing orders rendered by the trial court which fell under the jurisdiction of a different district court of appeal. For example, the Court stated: "Once the change of venue has become effective, appellate jurisdiction shall be in the district court of appeal for the transferee court, even if the challenged order was entered before the change of venue." 631 So. 2d at 1087 (emphasis added). So, too, when, in the instant case, venue is transferred back to the Eleventh Judicial Circuit for post-trial and sentencing proceedings, the appeal, following the rendition of the sentencing order, proceeds to the Third District, even though issues regarding the jury verdict will be litigated in that appeal.

Second, the reason for transferring venue to the Ninth Judicial Circuit was the concern over pretrial publicity, and the need for obtaining fair jurors who had not been influenced

by pretrial publicity. Once the jury verdict has been rendered, that is no longer a concern, so reasons for barring the transfer the case back to Miami, for completion of post-trial and sentencing proceedings and an appeal no longer exist, as the jury is no longer involved.

The Petitioner relies heavily on the Fourth District decision in Cole v. State, 280 So. 2d 44 (Fla. 4th DCA 1973), which held that an appeal should proceed in the Second District, where the trial occurred in Polk County, and the case was transferred back to Broward for sentencing proceedings. Cole found that the transfer back to Broward was nothing more than a convenience for the trial court judge.

Cole should not be followed for several reasons. First, Cole was decided prior to the promulgation of the provisions of Rule 2.260, which are set forth above. That rule, which authorizes the transfer of the case back to Miami after the trial, is not merely a matter of convenience. Significant, substantive proceedings are expected to be conducted in the judicial circuit to which the case is returned after trial. This is done at a point in time when the only reason for the initial change of venue is no longer a concern; the substantive reason for the change of venue has been rendered academic. Third, Cole was decided prior to this Court's decision in Vasilinda. As noted above, this Court deemed relevant the

determination of where the case "concluded" at the time of the filing of the notice of appeal. Fourth, although the jury portion of the trial was conducted in Orlando, the Miami-Dade community, as the community in which the crimes were committed, has a legitimate interest in having the appellate court for Miami adjudicate the appeal, if reasons do not exist for barring it from doing so. The taint of pretrial publicity does not extend to the appellate court judges.

The premise of Cole, that the case is being returned to its original venue, solely as a matter of convenience, does not take into consideration the significant substantive interest that a local community has in having criminal proceedings proceed in their own community, absent a compelling reason to the contrary. This has been addressed in the context of federal criminal proceedings.

For example, in United States v. Means, 409 F. Supp. 115, 117 (D. N. Dak. 1976), the Court stated: "The interest of a community that those charged with violations of its laws, be tried in that community, is not a matter to be cast aside lightly." See also United States v. Dubon-Otero, 76 F. Supp. 2d 161, 164-65 (D. Puerto Rico 1999).

Thus, the transfer of the case back to the original jurisdiction, for sentencing and other proceedings, at a point in time where the concerns of the effects of publicity on the

jury trying the case are no longer operative, has a significant substantive component, in addition to any convenience factor at issue.

While the Fifth District, in Stanek-Cousins, 896 So. 2d 865 (Fla. 5th DCA 2005), reached a contrary conclusion, that conclusion should be disapproved, as it is contrary to the principles set forth in Vasilinda. Stanek-Cousins did not consider the significance of the fact that the trial court proceedings concluded with the sentencing proceedings in the original trial court, after the transfer back, and it did not consider the point that jurisdiction for the appeal had to be determined at the time when the notice of appeal was filed, based on the jurisdiction of the trial court, at that time.

Under such circumstances, the Third District's interpretation and application of Vasilinda, resulting in the appeal proceeding in the District Court of Appeal where the criminal case was pending at the time of the filing of the notice of appeal, should be approved.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal below should be approved.

Respectfully submitted,

BILL McCOLLUM
Attorney General

____

RICHARD L. POLIN
Florida Bar No. 0230987
Chief Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue
Suite 650
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on the Merits was mailed this ___ day of May, 2010 to MANUEL ALVAREZ, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

____

RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

I HEREBY CERTIFY that the foregoing brief has been typed in Courier New, 12-point type.

____

RICHARD L.POLIN