

IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-2225

MICHAEL HERNANDEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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TABLE OF CONTENTS

	PAGE
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF THE ARGUMENT.....	
ARGUMENT	5
 WHEN VENUE IS TRANSFERRED TO ANOTHER CIRCUIT, APPELLATE JURISDICTION MUST LIE IN THE TRANSFEREE COURT WHERE THE DEFENDANT WAS CONVICTED. 	
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF FONT.....	9

TABLE OF CITATIONS

PAGE

CASES

<i>Cole v. State</i> , 280 So. 2d 44 (Fla. 4th DCA 1973).....	3, 5-6
<i>Stanek-Cousins v. State</i> , 896 So. 2d 865 (Fla. 5th DCA 2005).....	3, 6
<i>Vasilinda v. Lozano</i> , 631 So. 2d 1082 (Fla. 1994)	4-7

OTHER AUTHORITIES

FLORIDA RULES OF ADMINISTRATIVE PROCEDURE

Rule 2.260.....	6
Rule 2.260(b).....	2

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INTRODUCTION

Petitioner, Santo Hernandez, was the appellant in the district court of appeal and the defendant in the Circuit Court. Respondent, State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" designates the record on appeal.

STATEMENT OF THE CASE AND FACTS

Mr. Hernandez was indicted for first degree murder and attempted first degree murder in Miami-Dade County on February 18, 2004.

On June 24, 2008, the defense attorney filed a motion seeking a change of venue. The trial court granted the motion on July 1, 2008 and the venue was subsequently transferred to Orange County. The Honorable John Schlesinger, Circuit Court Judge of the Eleventh Judicial Circuit, presided over the trial in the Ninth Judicial Circuit in accordance with Rule 2.260(b), Florida Rules of Administrative Procedure (2009).¹

The trial was heard in the Orange County Courthouse commencing on September 8, 2008 until a guilty verdict was reached on September 24, 2008. The trial court adjudicated the defendant on September 24, 2008 in Orange County.

The defendant was later sentenced to life imprisonment in Miami-Dade County, on November 7, 2008. A timely notice of appeal was filed with the Court on November 7, 2008.

¹Rule 2.260(b) states: "The presiding judge from the originating court shall accompany the change of venue case, unless the originating and receiving courts agree otherwise."

On September 1, 2009, the appellant filed a motion seeking to transfer the appeal to the Fifth District. The Third District denied the motion and certified a conflict to this Court based on the fact that its decision is in direct conflict with *Cole v. State*, 280 So. 2d 44 (Fla. 4th DCA 1973) and *Stanek-Cousins v. State*, 896 So. 2d 865 (Fla. 5th DCA 2005).

SUMMARY OF THE ARGUMENT

*In this case, Mr. Hernandez was tried and convicted in Orange County after a transfer of venue. The fact that he was later sentenced in Miami-Dade County should not affect the jurisdiction of the appeal which, according to this Court's prior holding in *Vasilinda v. Lozano*, 631 So. 2d 1082, 1085 (Fla. 1994), resides in the appellate court which has jurisdiction over the transferee court.*

ARGUMENT

WHEN VENUE IS TRANSFERRED TO ANOTHER CIRCUIT, APPELLATE JURISDICTION MUST LIE IN THE TRANSFEREE COURT WHERE THE DEFENDANT WAS CONVICTED.

In *Vasilinda v. Lozano*, 631 So. 2d 1082, 1085 (Fla. 1994), this Court held that it is “a generally accepted principle that when venue is transferred to another jurisdiction and the case is *concluded* in the new jurisdiction, review of the final order is properly commenced in the appellate court which has jurisdiction over the transferee court.” (Emphasis added). The use of the word “*concluded*” appears to create an ambiguity because Mr. Hernandez was tried and adjudicated in the Ninth Judicial Circuit, but he was sentenced in the Eleventh Judicial Circuit. The decision does not specify whether “*concluded*” refers to the adjudication or the sentence. This apparent vagueness, however, is resolved by *Cole v. State*, 280 So. 2d 44 (Fla. 4th DCA 1973), which was cited by this Court in *Vasilinda* in support of its holding.

In *Cole*, a criminal defendant was charged with robbery in Broward County and the venue was transferred to Polk County, where the defendant was convicted. The case was then transferred back to Broward for sentencing. The Fourth District Court held that:

[O]nce the cause was transferred to and actually tried in the Criminal Court of Record for Polk County, jurisdiction remained in that court for the purpose of adjudication and sentencing. For the purpose of convenience we hold that the order transferring the cause back to the Court of Record for Broward County shall be given effect only as an administrative order for the convenience of the trial judge and the adjudication and sentence shall be treated as an adjudication and sentence of the Court of Record of Polk County, Florida.

Cole, 280 So. 2d at 45 (citation omitted); *see also*, *Stanek-Cousins v. State*, 912 So. 2d 43, 46-47 (Fla. 4th DCA 2005).

The court noted in *Cole* that unless appellate jurisdiction followed the change of venue, then if the conviction were reversed on appeal, the Fourth District Court would lack jurisdiction to order a new trial in Polk County. Similarly, in the case *sub judice*, if the present case were reversed by the Third District, under section 35.04, Florida Statutes (2009), the Third District would lack jurisdiction to order a new trial in the Ninth Judicial Circuit. The appeal of Mr. Hernandez's conviction, therefore, must be heard in the Fifth District (which has the authority to mandate a new trial in Orange County) in order to avoid this anomaly.

The State maintained below that this Court's holding in *Vasilinda*, *supra*,

which was decided before the adoption of administrative rule 2.260 in 1996, should be reinterpreted as a result of the subsequent rule. However, there is nothing in Rule 2.260 which indicates that a modification of *Vasilinda* is in order. The rule largely codified certain pragmatic administrative procedures in order to facilitate the transference of venue, such as the reimbursement of the transferee jurisdiction by the court of origin for various costs, the trial judge in the originating court accompanying the case to the new venue, et cetera. Furthermore, the statutorily defined jurisdiction of the appellate courts cannot be expanded by the promulgation of a rule of judicial administration.

CONCLUSION

Based on the foregoing arguments and authorities cited, Petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal and remand this case with instructions that the defendant's appeal be transferred to the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this 15th day of March, 2010.

BY: _____
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CERTIFICATION OF FONT

Undersigned counsel certifies that the font used in this brief is 14 point proportionately spaced Times Roman.

BY: _____
MANUEL ALVAREZ
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