

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,964

RENE RAMOS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE FACTS

Petitioner adopts the statement of facts in his brief on the merits.

SUMMARY OF ARGUMENT

The Respondent, State of Florida, has been unable to offer this Court a response to Petitioner's Argument I-A and I-B, in his brief on the merits. Instead, the State has devoted its brief to alternative sources of Appellate Review. None of these alternative sources of Appellate Review are available to the State.

First, the Respondent's reliance upon Florida Rules of Appellate Procedure 9.110 is a misinterpretation of that rule. Use of Rule 9.110 to obtain an appeal of a judgment of acquittal would serve to enlarge the rights of the State in matters which it may appeal. This position violates the concept that the State must look to Florida Statute 924.07 for its authority to appeal in criminal cases.

Alternatively, the State asserts that the review of a final judgment of acquittal could be accomplished by certiorari. This is also error. Certiorari is not available to enlarge the rights of a party litigant. In order to invoke certiorari jurisdiction, a litigant must provide to the petitioned court a reasonable excuse for failure to resort to appeal. The prohibition against the State appealing a judgment of acquittal cannot serve as a reasonable excuse for failure to resort to appeal. A court which has been petitioned for certiorari should make a distinction between its power to exercise certiorari jurisdiction and the right of the petitioner to have the matter reviewed. In the instant case, the statutory scheme prohibits the State from obtaining certiorari review of a final judgment of acquittal entered against it.

Finally, the State argues that it has a constitutional right of

appeal and therefore, is not bound by the statutes enacted by the legislature. This position is wrong because the case relied upon the State, Crownover v. Shannon, 170 So.2d 299 (Fla. 1964) did not deal with the State's right to appeal in criminal matters. Crownover involved a civil issue. The decision in State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA 1982), review denied (Fla. 1982), is incorrect in its conclusion that the State has a constitutional right to appeal.

First, W.A.M. relied upon Crownover, and, as before stated, Crownover does not stand for the proposition that the State has a constitutional right to appeal. Second, the legislature has unquestioned authority over the office of the Attorney General as the chief law enforcement officer of the State. Third, Florida has a strong historic policy disfavoring appeals by the sovereign. Fourth, a review of the decisions and statements of the public officials and courts at the time of the 1956 revision, and thereafter, clearly indicate that no intention was manifested to grant the State a constitutional right to appeal in the 1956 revision to Article V, of the Florida Constitution.

RESPONDENTS INTERPRETATION OF KIRSKEY v. STATE
AND RULE 3.620 IS ERRONEOUS

The States analysis of Kirskey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983), in an attempt to distinguish that case for the present case is both logically incorrect and factually incorrect. The State asserts that the trial court in Kirskey weighed the evidence and, finding the weight contrary to kidnapping verdict, reduced the conviction to false imprisonment. Therefore, according to the State, a question of fact was properly determined, and, the First District was correct. The Kirskey opinion, however, states that the trial court found

"that the evidence did not sustain
the verdict of kidnapping but was
sufficient to sustain a finding
of the lesser offense." Kirskey supra

There is absolutely no discussion of the weight of the evidence in that ruling.

The States interpretation of Fla.R.Crim.P. 3.620 is also erroneous. It is impermissible to distinguish between a finding of insufficiency of the evidence pursuant to a motion for Judgment of Acquittal and a finding of insufficiency of the evidence pursuant to Rule 3.620 coupled with a motion for new trial. A finding of insufficiency of the evidence to sustain a conviction requires an acquittal of that conviction and a "retrial" or "new trial" on that conviction is prohibited, Burks v. United States, 98 S.Ct 2141, 437 U.S. 1, 57 L.Ed.2d 1, (1978). ^{1/}

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Petitioner has looked into Respondent's footnote 3 for the
(Cont.)

Petitioner has clearly stated in the brief on the merits his position on Mixon v. State, 59 So.2d 38 (Fla. 1952). Contrary to the Respondents' assertions in Argument A of its brief, there is no indication in Mixon, that the act of the judge in that case was the same act as in the present case. To the extent that Mixon may stand for the proposition that the State may cross-appeal from a judgment of acquittal, Petitioner submits that it should be overruled. (See Argument D, Petitioner's Brief on the Merits).

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(Cont.) "numerous cases in this court or the other district courts of appeal" which the above interpretation runs afoul of and can only find a discussion of the Motion For New Trial under Rule 3.600. The Respondents discussion equates a finding that the verdict is contrary to law with a finding that the evidence is insufficient to sustain the verdict. However, Burks, supra, makes clear that these are separate concepts and expressly holds the opposite of Respondents conclusion. The flaw in the States' argument is that it puts undue emphasis on the words "or a motion for new trial".

II

RESPONDENTS ALTERNATIVE SOURCES OF APPELLATE REVIEW DEPEND
UPON A RIGHT TO APPEAL IN THE FIRST INSTANCE.

The Respondent takes the position that even though the legislature has withheld the right to appeal a judgment of acquittal from the State, such appeals could be brought under other Rules of Court. Such a position totally ignores the underpinnings of those other rules and each will be addressed separately.

A. CROSS APPEAL PURSUANT TO FLORIDA RULES OF
APPELLATE PROCEDURE 9.110.

The Respondents reliance upon Fla.R.App.P. 9.110(a), is an attempt to find some independent right of appeal for the State. This is a misinterpretation of Rule 9.110(a). The committee notes to Rule 9.110 expressly state that the rule governs "Except to the extent of conflict with Rule 9.140, governing appeals in criminal cases,". In turn, the committee notes to Rule 9.140, addressing Rule 9.140(c) Appeals by the State, observes "Subsection (c)(1) lists the only matters which may be appealed by the State". Rule 9.140(c) (1) simply tracks F.S. 924.07. In addition to the matters argued in footnote 4 to the Petitioners' brief on the merits (page 14), it is settled law that a rule of court cannot modify, enlarge, or infringe upon substantive rights. State v. Furen, 118 So.2d 6 (Fla. 1960). The interpretation of Rule 9.110 argued by Respondent would enlarge the right to appeal by the State as expressed in F.S. 924.07.

B. REVIEW OF A JUDGMENT OF ACQUITTAL BY
COMMON LAW CERTIORARI.

As another alternative, the State asserts that even though the

appeal of a judgment of acquittal is not authorized by Florida Statute 924.07, the State could have such a ruling reviewed by common law certiorari. This position is erroneous.

While Respondent is correct that the appellate courts have the power to entertain petitions for certiorari brought by the State, it does not follow that certiorari becomes an alternative vehicle for review of a matter the state is not permitted to appeal.

Certiorari is not a matter of right. A petitioner, in addition to a showing that the lower court exceeded its jurisdiction or departed from the essential requirements of law, must show the petitioned court justification for resorting to such an unusual remedy and a reasonable excuse for failure to resort to appeal. State v. Furen, 118 So.2d 6 (Fla. 1960). The petitioned court, in the exercise of its certiorari jurisdiction, may not abridge, modify or enlarge the substantive rights of any party. State v. Furen, supra. The reasonable excuse of the State for failure to direct appeal a final judgment of acquittal can only be that it is forbidden to do so. State v. Brown, 330 So.2d 535 (Fla, 1st DCA 1976). Permitting certiorari would only serve to enlarge the substantive rights of the state on this issue and such is not permitted. State v. Furen, 118 Sp.2d 6 (Fla. 1960). As was noted in C.C. v. State, 449 So.2d 280 (Fla. 3rd DCA 1983) at footnote 4.

"Contrary to the suggestion in State v. D.C.W., 426 So.2d 970, n.1 (Fla. 4th DCA 1982), I think it obvious that the court cannot save an appeal from a final judgment which it has no jurisdictional authority to consider by treating it as a petition for certiorari. Stein v. Darby, 134 So.2d 232 (Fla. 1961); Jacksonville T. & K.W.Ry.Co. v. Boy, 34 Fla. 389, 16 So. 290 (1894); State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976); 3 Fla.Jur.2d Appellate Review § 467 (1978)."

C. "RECHARACTERIZING" THE ORDER OF THE TRIAL COURT IS UNSUPPORTED BY THE RECORD.

The State alternatively argues that by simply recharacterizing the "judgment of acquittal" under review as an "order dismissing an indictment", the State could have obtained review. There is no support for such a position in the record or law. The trial court in the case sub judice clearly and unquestionably granted a motion for judgment of acquittal. (App. 1) No factual basis for converting the ruling to a dismissal of the indictment has been set forth by the State in its brief. Furthermore, State v. Harris, 439 So.2d 265, (Fla. 2nd DCA 1983), does not stand for the proposition advanced by the State.

The Harris court, on the facts before it in that case, determined that the trial judge had mislabeled an order arresting judgment as an acquittal.

D. THE CONSTITUTIONAL RIGHT OF THE STATE TO APPEAL

Unable to address Petitioner's Arguments I(A) and I (B) in the brief on the merits directly, the State, finally, arrives at the position it must take in order to prevail, i.e., the State has been granted a constitutional right to appeal by the 1956 Revision to the Florida Constitution. Relying on Crownover v. Shannon, 170 So.2d 299 (Fla. 1964) and State v. W.A.M., 412 So.2d 49 (Fla. 5th DCA 1982), the State takes the position that not only does it have a constitutional right to appeal, but further suggests the exercise of that right cannot be fettered by the legislature.

Although the decision in State v. W.A.M., 412 So.2d 49 (Fla.

5th DCA 1982), review denied (Fla. 1982)²/ is correct in its basic premise that Article V reflects a general right of appeal from final judgments, its summary one-sentence conclusion that the State has a constitutional right of appeal does not follow.

Preliminarily, a careful reading of Crownover v. Shannon, 170 So.2d 299 (Fla. 1964), relied upon by the W.A.M. court, refutes the asserted conclusion. Importantly, the State was not a party in Crownover, which involved a defendant seeking prohibition to prevent a district court from entertaining an appeal by a prison superintendent 32 days after the grant of habeas corpus relief, on the basis that the then controlling statute (§ 924.10) limited the state to appealing within 30 days after "the order or sentence . . . is entered." This Court carefully reviewed its prior decisions which had held that appeals from orders granting habeas corpus relief were governed by the cited statute controlling State appeals, and only after noting that in none of those cases was the State a party, then concluded that habeas corpus was a collateral attack, was civil in nature, and that the statute did not control. In thereby receding from its prior cases, and although stating in broad language that the right to appeal from final judgments of trial courts was no longer dependent upon statutory authority, this Court did not in the slightest respect question the validity of the statute governing the State's right to appeal.

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As this Court's records will reflect, the W.A.M. holding regarding a State right to appeal was not before this Court in W.A.M.'s petition for discretionary review. The W.A.M. petition sought review only of the holding on the merits that a continuance obtained by him waived the benefits of the juvenile speedy trial rule, Fla.R.Juv,P. 8.180.

If the Crownover court had intended what W.A.M. presumably construed it to say, it would not have gone to such length to discuss and recede from the prior cases, but would simply have invalidated the statutory limitations on constitutional grounds.^{3/}

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Further, the presumed reading of Crownover in W.A.M., if correct, renders inexplicable the post-Crownover decisions of State v. Brown and Balikes v. Speleous, Supra, as well as State v. I.B., 366 So.2d 186 (Fla. 1st DCA 1979), and Clement v. Aztec Sales, Inc., 297 So.2d 1 (Fla. 1974).

In State v. I.B., the court held that there was no authority for a State appeal from an order releasing a juvenile from detention. In a footnote, the court noted that review by a juvenile would be authorized under then § 39.03(7)(a), Fla. Stat. (1977). (The present provision is § 39.032(6)(a)). If a detention order were an interlocutory order, the statutory provision for appeal by a juvenile would be constitutionally invalid under Article V, § 4(b)(1). See, R.J.B. v. State, 408 So.2d 1048 (Fla. 1982). If, on the other hand, such an order were a final order (which, unlike its predecessor which was silent, § 39.032(6)(a) now so specified), under the reading of Crownover given by W.A.M. the I.B. conclusion that there was no authority for a state appeal from a release order would be incorrect.

Similarly, the decision in Clement v. Aztec Sales, supra, which reversed a district court and held that an order granting a new trial is a substantive right, not interlocutory, so that the legislature could provide an appeal therefrom, would be unexplainable.

W.A.M. is a complete departure from well-established Florida law. Legislative authority over the Attorney General, as the chief law enforcement officer of the State, is unquestionable. Ervin v. Collins, 85 So.2d 852 (Fla. 1956); State ex rel Landis v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823 (1934); State of Florida ex rel Chevron v. Exxon Corporation, 526 F.2d 266 (Fla. 5th Cir. 1976). In the only criminal appellate decision expressly reaching this issue since W.A.M. was decided, the First District recognized the doctrinal conflict and properly treated Whidden v. State, 159 Fla. 691, 32 So.2d 577 (Fla. 1947), as controlling. State v. Creighton, 438 So.2d 1042 (Fla. 1st DCA 1983) (dismissing state appeal under Whidden and certifying conflict).

The error of W.A.M. and its progeny, and of the Respondent, is the critical failure to recognize either the strong historic policy disfavoring appeals by the sovereign, the explicit history of the 1956 Article V revision, or this Court's controlling view of the matter. As discussed in Argument I(A) of the Petitioner's brief on the merits, Florida common law does not permit the State the right of appeal. State v. Burns, 18 Fla. 185 (1881).

Of additional pertinence is the fundamental principle that unlike the federal constitution, which is a document of delegated powers bestowing power only in specific grants, the state constitution is regarded primarily as a limitation on power as distinguished from a grant of power. Peters v. Meeks, 163 So.2d 753 (Fla. 1964); 16 Am. Jur. 2d, Constitutional Law, § 58. Its major function is to limit governmental power as against the rights of individuals. Tibbetts v. Olson, 19 Fla. 824, 108 So. 679 (1926).

Finally, and in ironic juxtaposition to the Respondent Attorney General's present position before this Court, was the opinion issued by then Attorney General Richard W. Ervin, a member of the Judicial Council, to Governor LeRoy Collins just three weeks before the amendment was submitted to the voters:

An appeal "as a matter of right" is simply an appeal in which the court must take jurisdiction, as distinguished from certiorari, where the assertion of jurisdiction by the court is discretionary.

Litigants now can appeal as a matter of right, and this has been our practice in Florida for generations... .

1956 Op. Att'y Gen. Fla. 056-306 (October 16, 1956) (Proposed Amendment to Art. V, State Const. - Construction of Words Appeal "As a Matter of Right").

Thus, the practice in Florida for generations, which conclusively distinguished the State's right to appeal from that of an ordinary litigant and treated the former as restricted, State v. Burns, 18 Fla. 185 (1881), State v. Frear, 155 Fla. 479, 20 So.2d 481 (1945); Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947), was unaltered by the 1956 revision.

With a clear view of the foregoing circumstances attendant to the 1956 revision, the Court, in State v. Harris, 136 So.2d 633 (Fla. 1962), made this controlling observation:

While the legislature cannot limit the constitutionally conferred authority of this Court to entertain petitions for certiorari, we have no doubt that it can restrict the state in seeking review by certiorari of adverse decisions in criminal cases just as it has limited its right to appeal through Sec. 924.07. Id. at 634. (Emphasis supplied).

It is of particular significance that joining in the Court's unanimous Harris opinion was Justice Thomas, who had been the chairman of the Judicial Council, for the 1956 Revision.

Accordingly, neither before nor after the decision of Crownover v. Shannon, 170 So.2d 299 (Fla. 1964), upon which W.A.M. based its reasoning, and neither before nor after the 1956 revision, has this Court ever discussed the State's right to appeal a final criminal case order in other than statutory terms. See, e.g., State ex rel. Sebers v. McNulty, 326 So.2d 17, n. 2 at 18 (Fla. 1975); Carroll v. State, 251 So.2d 866, 870 (Fla. 1971); Jenkins v. Lyles, 223 So.2d 740 (Fla. 1969); State v. Schroeder, 112 So.2d 481 (Fla. 1945). See also, Commentary to Florida Rule of Appellate Procedure 9.140. stating that the rule's provisions for State appeals track Section 924.07, Fla. Stat. (1975).

See also, State v. Matera, 378 So.2d 1283 (Fla. 3rd DCA 1980), cert. denied, 386 So.2d 639 (Fla. 1980):

" . . . [T]hose doors open to the State in initiating appellate review are limited to a specific set of circumstances, See Sections 924.07 and 924.071 Florida Statutes (1977), and Fla.R. App.P. 9.140(c). . . ."

Id. at 1286-1287.

At common law, the right of appellate review was not regarded as unqualified or absolute, but rather as one created by law. Hines v. Noel, 110 Fla. 457, 149 So. 17 (1933). The Petitioner submits that a proper construction of Article V, § 4(b)(1) must recognize the power of the sovereign, through the legislature as law-making body, to restrict the sovereign's own right to appeal, particularly as it has done in criminal cases. The provisions of Florida Statute 924.07

are controlling within their scope, and Respondent has advanced no argument on this appeal to refute the interpretation of that statute as advanced in Petitioner's brief.

CONCLUSION

Petitioner respectfully requests the Court enter an order quashing the opinion of the Third District Court of Appeal under review, and remanding the case with instructions to dismiss the cross-appeal of the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed/hand delivered on the 1st day of April, 1985, to: The Office of the Attorney General, G. BART BILLBROUGH, Esq., 401 N.W. 2nd Avenue, Suite 820, Miami, FL 33128; Express Mailed to Sid J. White, Clerk of the Supreme Court of Florida

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