Florida Law Review

Volume 1 | Issue 3 Article 10

March 2021

Appellate Review of Habeas Corpus in Florida

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The most logical way to secure the benefit which the amendment seeks to confer is to permit the spouse holding title in severalty to convey to both spouses as co-grantees. The only impediment advanced against the creation of an estate by the entirety in this way is the rule, logically irrelevant in a conveyance by one spouse to a separate and distinct legal entity, that a grantor cannot convey to himself.[38] Once the rule is clearly analyzed and accordingly distinguished, a conveyance from one spouse to both spouses satisfies all the requisites of the estate.[39] While such a conveyance is within the spirit of the amendment, it is regrettably not within its letter.

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APPELLATE REVIEW OF HABEAS CORPUS IN FLORIDA

Until April 1, 1942, when the present Florida Supreme Court Rules of Practice became effective, appellate review of proceedings at law in a lower court was invoked by writ of error, except in those instances in which certiorari or prohibition would be appropriate or for which there was other express provision of law.[1] Appeal was not allowed in any law procedure.[2]

Rule 2 of the Supreme Court of Florida abolishes relief by writ of error and provides that all relief formerly obtained by that writ shall henceforth be sought by appeal, as in equity. Return days of appeals have likewise been abolished, and the filing of a notice of appeal with the clerk of the lower court now gives the Supreme Court jurisdiction of the subject-matter and the parties.[3]

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the wife was not "another person" within the statute).

[38]See note 27 *supra.*

[39]Cadgene v. Cadgene, 17 N. J. Misc. 332, 8 A.2d 858 (1939); *In re* Klatzl's Estate, 216 N. Y. 83, 110 N. E. 181 (1915); *In re* Vandergrift, 105 Pa. 293, 161 Atl. 898 (1932); Lawton v. Lawton, 48 R. I. 134, 136 Atl. 241 (1927).

[1]FLA. STAT. 1941, §59.01; Pleasant Valley Farms v. Carl, 90 Fla. 420, 106 So. 427 (1925).

[2]Trabue v. Williams, 46 Fla. 228, 35 So. 872 (1903); Montgomery v. Thomas, 40 Fla. 450, 25 So. 62 (1899).

Rule 36, however, makes an exception as regards appeals from habeas corpus proceedings. While this rule substitutes appeal for writ of error, it provides that application therefor be made in accordance with Section 79.11, Florida Statutes 1941, which requires that leave to appeal must be obtained from either a justice of the Supreme Court or the judge who heard the case.[4] Pursuant to this statute, the Supreme Court held that a writ of error issued by the clerk of the lower court is a nullity and will be dismissed.[5] The same result has quite logically been reached in construing Rule 36. A recent case holds that unless leave to appeal in habeas corpus proceedings is granted in accordance with Section 79.11, Florida Statutes 1941, the Supreme Court is without jurisdiction to review the case.[6] The language of Rule 2 is broad enough to do away with the necessity of allowance of the appeal by the court below or a justice of the Supreme Court, but when it is construed in connection with Rule 36 the result is that Section 79.11 remains in force, and either appeal or writ of error will lie to review a judgment in habeas corpus.[7] While one case holds that the Supreme Court is without jurisdiction to review a judgment in habeas corpus in the absence of an order allowing the appeal,[8] it would perhaps be more nearly accurate to say that the Supreme Court will refuse to take jurisdiction without such an order,

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[3]The text of Rule 2 reads:

"(a) Writ of Error-Appeal Substituted. Relief by writ of error in this court is hereby abolished. All relief heretofore obtained by writ of error shall be obtainable by appeal as in equity, ...

"(b) Return Days Abolished. Return days of appeals are abolished and the date upon which the record on appeal is filed in this court shall be the date from which the time for filing motions . . . shall commence to run.

"(c) Notice of Appeal. Effective Filing. The filing of the notice of appeal with the clerk of the court whose order, judgment or decree is appealed from shall give the appellate court jurisdiction of the subject matter and of the parties to the appeal, but it shall nevertheless be recorded in the minutes of the court whose order, judgment or decree is appealed from."

[4]The text of Rule 36 reads:

"(a) Writs of error from judgments in habeas corpus cases as authorized by law are hereby abolished and relief by appeal substituted, provided application therefor be made as provided in Section 79.11, Florida Statutes 1941."

[5]Roach v. Keep, 73 Fla. 1048, 75 So. 528 (1917); Wright v. State, 32 Fla. 472, 14 So. 43 (1893).

[6]State *ex rel.* Brister v. Brister, 158 Fla. 662, 29 So.2d 699 (1947).

[7]State *ex rel.* Wilson v. Quigg, 154 Fla. 548, 17 So.2d 697 (1944).

[8]State *ex rel.* Brister v. Brister, 158 Fla. 662, 29 So.2d 699 (1947).

since appellate jurisdiction is conferred on the Supreme Court by the Florida Constitution, and the method of invoking it is left to the Supreme Court and the Legislature.[9]

There is considerable difference between an appeal and a writ of error. Appeal is a civil-law process which removes the entire cause to the appellate court, subjecting the facts as well as the law to review, while a writ of error is of common-law origin and removes nothing to the appellate court for review except alleged errors of law.[10] An appeal is a continuation of the old suit, whereas a writ of error is a new action instituted to annul the judgment of the lower court on the law.[11]

Since the Florida Constitution gives the Legislature power to regulate practice and procedure in the state courts,[12] the Supreme Court, in the absence of an enabling act, has no power to enact rules of practice in the lower courts inconsistent with existing law.[13] Under Section 25.03, Florida Statutes 1941, the Supreme Court has power to formulate its own rules regardless of whether these follow the statutes, but for the lower courts it may promulgate only such rules as are consistent with law.[14] It has inherent power to regulate its practice without statutory authority,[15] but, since the Legislature is permitted to operate in the same field, by enacting general laws, this rule-making power is necessarily narrowed.[16] By Section 25.03 the Supreme Court is invested with, and the lower courts are divested of, the power to prescribe rules of practice for the lower courts,[17] these latter having such inherent power only when proper

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[9]FLA. CONST. Art. V, §5; State *ex rel.* Wilson v. Quigg, 154 Fla. 548, 17 So.2d 697 (1944); Burnett v. State, 144 Fla. 689, 198 So. 500 (1940).

[10]Dower v. Richards, 151 U. S. 658, 14 Sup. Ct. 452, 38 L. Ed. 305; Whidden v. Abbott, 119 Fla. 25, 160 So. 475 (1935).

[11]*Ex parte* Williams, 226 Ala. 619, 148 So. 323 (1933); Patterson v. Old Dominion Trust Co., 149 Va. 597, 140 S. E. 810 (1927).

[12]FLA. CONST. Art. III, §§20, 21; Petition of Florida State Bar Ass'n, 145 Fla. 233, 199 So. 57 (1940).

[13]See note 12 *supra.*

[14]Petition of Florida State Bar Ass'n, 145 Fla. 233, 199 So. 57 (1940); Keen v. State, 89 Fla. 113, 103 So. 399 (1925).

[15]State *ex rel.* Wilson v. Quigg, 154 Fla. 548, 17 So.2d 697 (1944); Humphries v. Hester & Stimson Lumber Co., 103 Fla. 1079, 141 So. 749 (1932); Sydney v. Auburndale Const. Corp., 96 Fla. 688, 119 So. 128 (1928).

[16]FLA. CONST. Art. III, §§20, 21; Petition of Florida State Bar Ass'n, 145 Fla. 233, 199 So. 57 (1940).

[17]Wilhelm v. South Indian River Co., 98 Fla. 970, 124 So. 729 (1929); State *ex rel.* Ross v. Call, 39 Fla. 504, 22 So. 748 (1897).

regulations are not otherwise provided.[18]

In 1945 the Legislature passed Section 59.01, Florida Statutes 1941 (Supp. 1945), adopting Rule 2 in statutory form and declaring that in case of inconsistency between this statute and any Supreme Court rule the latter shall apply. Section 45 of the same act repeals Section 67.07, Florida Statutes 1941, and all laws or parts of laws in conflict therewith. The language of this statute is sufficiently broad to repeal Section 79.11, but, since the act was passed for the purpose of reconciling the statutes and the Supreme Court rules,[19] and since Rule 2 had previously been construed not to abrogate the requirement that an order allowing appeal in habeas corpus be issued by the judge who heard the cause, or by a justice of the Supreme Court,[20] the logical conclusion is that the Legislature intended Section 79.11 to remain in effect. Since Section 25.03 gave precedence to Supreme Court rules over conflicting statutes, the act of 1945 has no effect on the method of appeal in habeas corpus.

At present the method to invoke appellate review in all cases except those in which certiorari or prohibition will lie, or for which other express provision is made, is by appeal.[21] Except in habeas corpus, filing notice of appeal with the clerk of the court from which appeal is taken gives the Supreme Court jurisdiction of the subject-matter and the parties.[22] The notice of appeal must still be recorded in the minutes of the lower court, but such recording is not jurisdictional.[23]

No valid reason has been advanced to support the requirement that appeals in habeas corpus should require allowance by the court while other appeals are allowed by the clerk. Indeed, appeals in habeas corpus should be as speedy as possible.[24] To effectuate this purpose it appears advisable either to repeal Section 79.11, prescribing that leave to appeal in habeas corpus can be allowed only by the trial court or by a justice of the Supreme Court, or alternatively to revise Rule 36 so that it does not refer to the statute. Failing this, Rule 2 should at least be reworded so that it states no more than it is meant to state.

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[18]State *ex rel.* Ross v. Call, 39 Fla. 504, 22 So. 748 (1897).

[19]See Preamble to FLA. STAT. 1941, §59.01.

[20]State *ex rel.* Wilson v. Quigg, 154 Fla. 548, 17 So.2d 697 (1944).

[21]FLA. STAT. 1941, §59.01 (Supp. 1945); Rule 2, Sup. Ct. Rules of Practice.

[22]FLA. STAT. 1941, §59.01 (Supp. 1945); Rules 2, 36, Sup. Ct. Rules of Practice.

[23]FLA. STAT. 1941, §59.01 (Supp. 1945).

[24]FLA. CONST., DECL. OF RIGHTS §7; Carter v. State, 54 Fla. 347, 61 So. 591 (1913).