

IN THE
SUPREME COURT OF FLORIDA

CASE NO. 67, 479

THE MIAMI HERALD PUBLISHING COMPANY
and PALM BEACH NEWSPAPERS, INC.,

Petitioners,

v.

JOHN W. HAGLER
and the STATE OF FLORIDA

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT STATE OF FLORIDA'S BRIEF ON JURISDICTION

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STATEMENT OF THE FACTS AND THE CASE

Respondent, State of Florida, does not take issue with petitioner's statement of the facts and the case except for petitioner's conclusion that the decision below conflicts with a decision of the Second District Court of Appeal.

A citation per curiam opinion by one district court of appeal cannot conflict with a decision of another district court of appeal. Moreover, conflict cannot be established by examination of the record in the per curiam case and argument upon factual distinctions thus gleaned.

SUMMARY OF ARGUMENT

If jurisdiction exists at all in this case it is simply because the decision below cited as controlling authority a case now pending review in this court - Palm Beach Newspapers, Inc. v. Burk, ___So.2d___, 10 F.L.W. 1435 (4th DCA 1985).

However, respondent believes this case is essentially moot and that the legal issues raised below will be answered in Burk, supra. The "facts" which petitioners would have the Court address in this case are without foundation in truth and have been sufficiently sensationalized already. There is no need for the Court to address them.

ARGUMENT

I. WHETHER THE FLORIDA SUPREME COURT
HAS JURISDICTION TO REVIEW THIS CASE ON
THE BASIS OF EXPRESS AND DIRECT
CONFLICT.

The decision of the Fourth District Court of Appeal in this case reads in its entirety:

PER CURIAM.

The order of September 12, 1983, is affirmed on authority of Palm Beach Newspaper, Inc. v. Burk, Case No. 83-422 (Fla. 4th DCA June 11, 1985).

Appended to the decision is a brief dissent by Judge Barkett. The dissent, of course, presents no basis for conflict jurisdiction in this Court. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Petitioner contends this Court has conflict jurisdiction for three reasons: 1) on the basis of Jollie v. State, 405 So.2d 418 (Fla. 1981), express and direct conflict exists because of the district court's reliance on Palm Beach Newspapers, Inc. v. Burk, supra, now pending in this Court; 2) the district court's decision in this case conflicts expressly and directly with Short v. Gaylord Broadcasting Company, 462 So.2d 591 (Fla. 2nd DCA 1985); 3) examination of the record in this case confirms conflict with Short v. Gaylord, supra. These contentions will be treated seriatim.

1. Conflict on basis of Jollie v. State, 405 So.2d 418 (Fla. 1981).

Respondent acknowledges that because of the pending case of Palm Beach Newspapers, Inc. v. Burk, supra, which the Fourth District cited as controlling authority, this Court could accept the case at bar for review. However, the Court's conflict jurisdiction is still only discretionary, and for the reasons set out infra, respondent believes review would be inappropriate.

2. Conflict with Short v. Gaylord Broadcasting Company, 462 So.2d 591 (Fla. 2nd DCA 1985).

In Jollie v. State, supra, this Court acknowledged the one circumstance in which the Court could review a citation per curiam opinion on the basis of conflict - that is, where the potential for conflict existed because the cited case was pending in or had been reversed by the Court. Otherwise, there being no written opinion, there can be no "express" conflict with another district court decision because the term "express" means "to represent in words." Neither the word "affirmed" nor the mere citation of controlling authority can constitute conflict with the decision of another district court of appeal. Jenkins v. State, 385 SO.2d 1356, 1359 (Fla. 1980); Dodi Publishing Company v. Editorial America, 385 So.2d 1369 (Fla. 1980).

3. "Record Conflict" on the basis of Jollie v. State.

Petitioners' argument here is utterly without authority and improperly seeks to revive the "record proper" basis for conflict jurisdiction abolished by the 1980 amendment to Article 5, Section 3(b)(3), Florida Constitution. Contrary to their argument, Jollie v. State does not recognize record conflict.

Jollie observes that this Court "must acknowledge its own public record actions" in the context of determining whether a district court per curiam opinion for which review is sought "cites as controlling authority a decision that is either pending review in or has been reversed by this Court." Jollie v. State, 405 So.2d at 420. Obviously, this ruling is directed toward district court decisions that may conflict with Supreme Court decisions, not with decisions of other district courts. The ruling most certainly does not reinstitute the practice of examining case records for conflict in district court decisions. Yet, petitioners' brief invites just such a foray in arguing that, "[a] review of the record in the instant case confirms that the Fourth District's decision in fact conflicts with the Second District's decision in Short." (Brief, p. 9). If anything, what has been confirmed in recent years is the demise of record proper conflict as a basis for jurisdiction in the Supreme Court. See, Jenkins v. State, supra.

4. Whether the Court should entertain this case on the merits.

As the respondent pointed out in its response to petitioner's motion to consolidate this case with Palm Beach Newspapers, Inc. v. Burk, Case No. 67, 352 and Palm Beach Newspapers, Inc. v. Freund, Case No. 67, 482, the issues in this case are moot as a practical matter, and the Burk decision will resolve any lingering legal uncertainties about the right of access to discovery depositions. There is thus no need to accept this case for review.

Petitioners argue that the case should be entertained on the merits so that the Court will be apprised of the "full range of factual circumstances occurring where deposition access is at issue." (Brief, p. 3). Of course, on its face, this statement is absurd because neither three nor one hundred and three cases would cover all the factual circumstances that the press and other media might want to report. Moreover, the question here is whether there is any right of access at all, not whether the facts to be addressed in a particular deposition warranted inclusion or exclusion of the press.

In this case, the deposition of a state attorney was taken in circumstances where the criminal defendant accused the state attorney of a conflict of interest in a drug prosecution because the defendant claimed to have compromising photographs of the

state attorney. Much has been made of this claim already in the press. As the deposition of Richard Stoutenburgh shows (Appendix to Petitioners' Jurisdictional Brief), the claim was wholly baseless and the photographs were only ordinary pictures of people on a boat, not in the slightest way compromising. These facts need no further airing, not in this Court and not in yet another round of press reports.

CONCLUSION

The legal issues raised in this case will be addressed by the Court in Palm Beach Newspapers, Inc. v. Burk. There is no reason for the Court to entertain this case on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by United States Mail this 4th day of

~~August~~, 1985 to:

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