

IN THE SUPREME COURT OF FLORIDA

MARTIN FRANCIS McGARRY,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 67,506

FILED
SID J. W.
SEP 16 1985
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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts.

In the brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by respondent unless otherwise indicated.

The symbol "PB" refers to Petitioner's Brief.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and his Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the lower courts.

POINT INVOLVED

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL PRESENTS DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION: AND THEREFORE WHETHER THE SUPREME COURT'S JURISDICTION CAN BE PROPERLY EXERCISED? (Restated).

SUMMARY OF ARGUMENT

Petitioner has not, and cannot, demonstrate that the decision of the Fourth District Court of Appeal in the instant case "expressly and directly" conflicts with other state appellate decisions pursuant to Florida Constitution Art. V, Section 3(b)(3). Therefore, this Honorable Court should decline to accept jurisdiction of the case.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT PRESENT DIRECT AND EXPRESS CONFLICT UNDER THE MEANING OF ARTICLE V OF THE FLORIDA CONSTITUTION; THEREFORE, THE SUPREME COURT'S JURISDICTION CANNOT BE PROPERLY EXERCISED. (Restated).

This Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same point of law. Fla.R. App.P. 9.030(a)(2)(A)(iv) (1981). For purposes of establishing jurisdiction, conflict may appear as the announcement of a rule of law which conflicts with the rule previously announced, or by the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

Petitioner seeks to establish this Court's "conflict" jurisdiction by arguing that the decision below directly and expressly conflicts with district court decisions in Moore v. State, 339 So.2d 228 (Fla. 2nd DCA 1976), and Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984). Respondent maintains that Petitioner has not demonstrated conflict with other state appellate decisions from the face of the decision sub judice, that the decision does not conflict with other decisions, and that this Honorable Court therefore lacks

jurisdiction to grant Petitioner's application for discretionary review.

It is well-settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create conflict. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980). Petitioner has not and cannot demonstrate that the decision of the Fourth District Court of Appeal in the instant case expressly and directly conflicts with another state appellate decision.

In Moore v. State, supra, the Second District Court held that when a trial judge and a defendant enter into a negotiated plea, the judge should not reject the terms of the plea negotiations without first allowing the defendant an opportunity to withdraw his plea. Supra at 231. Only in dicta, did the district court state that probation is the appropriate procedure to impose terms for future behavior upon which the length of a sentence is conditioned. Supra at 230. In Moore, unlike in the case at bar, the trial judge deferred imposition of sentence for six months in order to evaluate the defendant's future behavior. Sub judice, sentence was deferred two months to allow Petitioner the opportunity to make restitution (Petitioner's Appendix, pp. 3-4) and thereby reduce his sentence. Thus Moore is clearly inapposite to the instant case.

Petitioner also argues that the instant decision is in conflict with Hubler v. State, supra, because it is

error to impose a greater sentence for a crime that a defendant was not convicted for (PB 8). Petitioner's interpretation of the facts at bar, (i.e.) that a greater sentence was imposed, is the same argument the Fourth District Court rejected. What occurred in the base at bar, was the trial court accepted a negotiated plea in accordance with all the necessary safeguards enunciated in Davis v. State, 308 So.2d 27, 29 (Fla. 1975). The fact that Petitioner's actual sentence was "the worst possible scenario" envisioned when he entered into the agreement, does not mean he did not receive that which he had bargained for.

It is thus evident that petitioner seeks to invoke this Honorable Court's jurisdiction in a thinly veiled attempt to pursue a second appeal. Such a use of the court's jurisdiction is not permitted. Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). The court has repeatedly condemned such misguided efforts to invoke its discretionary jurisdiction and has repeatedly emphasized the need for finality in district court of appeal decisions. Jenkins, supra. Petitioner has failed to show express and direct conflict between the decision sub judice and any other state appellate decision and respondent therefore maintains that this Honorable Court lacks jurisdiction to grant Petitioner's application for discretionary review.

CONCLUSION

Based upon the foregoing argument and authorities cited therein, the respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the cause.

Respectfully submitted,

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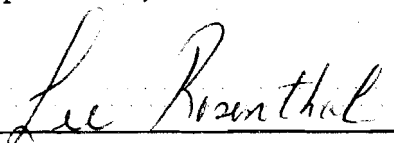


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: LOUIS G. CARRES, Assistant Public Defender, 224 Datura Street, West Palm Beach, Florida 33401, this 12th day of September, 1985.



Of Counsel