

IN THE SUPREME COURT OF FLORIDA

FILED
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JUN 10 1989

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AIDA HERNANDEZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case no.: 74210

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Respondent was the appellee and the prosecution, respectively, in those courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to the appendix which includes the decision of the district court of appeal.

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts, but reserves the right to develop further facts in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

The decision of the fourth district court of appeal in this case does not directly and expressly conflict with a decision of the third district or this Court on the question of whether commission of drug trafficking in a professional manner is a valid reason for a guidelines sentence departure.

ARGUMENT

THE DECISION OF THE COURT OF APPEAL IN THIS CASE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A DECISION OF THIS COURT AND WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE QUESTION OF WHETHER THE COMMISSION OF DRUG TRAFFICKING IN A PROFESSIONAL MANNER IS A VALID REASON FOR A GUIDELINES DEPARTURE.

Petitioner alleges that the Third District's decision in Collins v. State, 535 So.2d 661 (Fla. 3d DCA 1988), is in direct and express conflict with this Court's decision in State v. Fletcher, 530 So.2d 296 (Fla. 1988) and the Fourth District's decision in Hernandez v. State, 540 So.2d 881 (Fla. 4th DCA 1989). A consideration of this Court's past pronouncements, coupled with an objective reading of the decisions involved, will confirm that no conflict, and hence no basis for jurisdiction, exists.

In order for two court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of its brother or father court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975). In Jenkins v. State, 385 So.2d 1356, 1358 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same of law. The dictionary definition of the terms 'express' include: 'to represent in words'; to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary (1961 ed. unabr.)

See generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlacoochee River Electric Co-op v. Tampa Electric Company, 158 So.2d 136 (Fla. 1963), cert. denied, 377 U.S. 952, 84 S.Ct. 1628, 12 L.Ed.2d 497 (1964); and England and Williams, Florida Appellate Reform One Year Later, 9 F.S.U. L. Rev. 221 (1981). This Court has in general granted conflict review only over decisions in which the conflict has been acknowledged in the opinion of the district court, see e.g. Barnes v. State, 426 So.2d 1274 (Fla. 1st DCA 1983), reversed, 441 So.2d 626 (Fla. 1983). While a district court cannot thoroughly misapply a precedent of either this Court or another district court and then escape conflict review of its decision, that is not what happened here. A careful review of the decisions with which the decision below is alleged to conflict will reveal that each is factually distinguishable.

In Collins v. State, 535 So.2d 661 (Fla. 3d DCA 1988), the defendant was convicted of trafficking in cocaine and possession of cannabis. One of the reasons given for departure was:

2. Executing the crimes in a professional manner. See Dickey v. State, 458 So.2d 1156 (Fla. 1st DCA 1984). The packaging, use of small

envelopes, locked trunk support a conclusion of professional execution.

In holding this reason invalid, the third district stated:

The second reason, stated above, is not a clear and convincing reason for departing from the sentencing guidelines because the stated reason is an inherent component of the crime of trafficking in cocaine. Indeed, the state concedes that this was an invalid reason for the subject departure. (citations omitted)(emphasis added).

As seen from the above, the court did not hold that the professional manner of trafficking can never be a valid reason for departure in a trafficking case. Obviously, a trial court cannot not just make a bare bones assertion that a crime was committed in a professional manner. There must be record facts to support that contention. In this case, the third district concluded that the record facts (the use of small envelopes and a locked trunk) did not support departure. Cf. State v. Rosseau, 509 So.2d 281 (Fla. 1987)(psychological trauma may be a valid reason for departure if the underlying facts indicate that it is not of the type inherent in the crime).

Similarly, in State v. Fletcher, 530 So.2d 296 (Fla. 1988), the trial court gave the following reason for departure:

3. That the defendant planned and calculated the crime with sophistication and well organized premeditation including "months of plotting and scheming."

The fourth district held that under the facts of that case, this was not a valid reason for departure. The court

did not hold that the professional manner in which trafficking is conducted could never be a valid reason for departure. Rather, the court concluded that the reasons given to show that the crime was committed in a professional manner (simply that there was calculated planning and scheming) are inherent elements of large drug trafficking cases. This Court approved the decision of the Fourth District, agreeing that all large drug trafficking cases involve premeditation and planning. This Court did not hold that the facts supporting a trial court's conclusion that a drug trafficking crime was committed in a professional manner could never support departure. In fact, it suggested otherwise when it cited Rousseau, 530 So.2d at 297-98.

In Hernandez v. State, 540 So.2d 881 (Fla. 4th DCA 1989), the defendant was convicted of trafficking in cocaine and of conspiracy to traffic in cocaine. The fourth district held that underlying facts in that case supported the trial court conclusion that the crime was committed in a professional manner and that those facts supported departure. Since the court did not elaborate as to what the underlying facts were in Hernandez, it is impossible for this Court to conclude that Hernandez conflicts with Collins or Fletcher. See Jenkins, 385 So.2d at 1359. Cf. Harris v. State, 531 So.2d 1349 (Fla. 1988)(underlying facts supported trial court's finding that emotional trauma was a valid reason for departure).

CONCLUSION

Based on the foregoing argument and authorities, this Court does not have jurisdiction.

Respectfully submitted,

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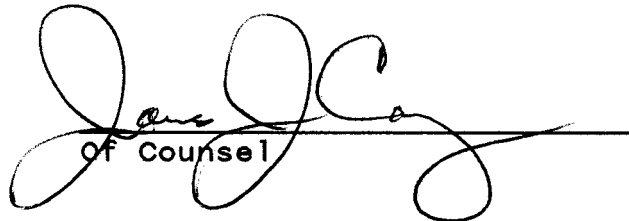


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Tanja Ostapoff 9th Floor Governmental Center, 310 North Olive Ave., W. Palm Beach FL, 33401, this 13th day of June, 1989.



Of Counsel