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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76, 826

ANTHONY FONTANA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

FILED  
SID J. WHITE  
DEC 28 1984  
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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts with the following additions and clarifications.

The court did not speak in terms of any detention of petitioner. It said that petitioner did not have standing to contest the search and seizure of the car. Petitioner reserves the right to include additional 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 any district court. All the cases cited by petitioner are factually, and thus legally distinguishable.

## ARGUMENT

THE DECISION OF THE COURT OF APPEAL IN THIS CASE DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A DECISION OF WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE QUESTION OF WHETHER A PASSENGER OF A MOTOR VEHICLE MAY ROUTINELY BE ORDERED OUT OF THE VEHICLE DURING A TEMPORARY DETENTION WHEN THERE ARE NO FACTS JUSTIFYING THE OFFICER TO FEAR HIS SAFETY.

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 the other court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975). In Jenkins v. State, 385 So.2d 1356, 1359 (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 question 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). See also Mystal Marine, Inc. v. Harrington, 339 So.2d 200, 210 (Fla. 1976) (This Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

Petitioner claims that the decision conflicts with decisions of other district courts of appeal because this case involved a situation where a passenger of a motor vehicle was "routinely ordered out of the vehicle during a temporary detention when there are no facts justifying the officer to fear his safety." (petitioner's brief p. 6).

Unlike the case which supposedly conflict, as shown by the findings recited by the fourth district, there are facts justifying the officers to fear for their safety. It was early in the morning in a lounge parking lot. The area was known for illegal drinking by minors, gang fights, and drugs. Appellee was observed by the officers numerous times, coming and going from the club with different groups of people. On the last trip, he exited the lounge and entered the passenger side of a parked automobile. Prior to entering the car, all the individuals nervously looked around the area as if to determine if anyone was watching them. Based on their experience and training, the officers believed a drug deal was occurring. As the police approached, appellee made a furtive movement, trying to conceal something beneath the passenger's seat. See State v. Fontana, 566 So.2d 937 (Fla. 4th DCA 1990).

To say that under these circumstances this case involves a situation where "there are no facts justifying the officer to fear his safety," is absurd. Nor did the fourth district so hold. By contrast, in Dees v. State, 564 So.2d 1166 (Fla. 1st DCA 1990), there were no other facts other than a furtive movement, giving the officer reason to fear for his safety. Unlike the present case, the First District found that founded suspicion did not exist. Additionally, unlike the present case, in Dees the contraband was removed from the defendant's person and her purse, it was not a clear baggie of cocaine visible in an automobile that did not belong to Fontana.

In Griggs v. State, 565 So.2d 361 (Fla. 1st DCA 1990), there was no indication that the officer had any reason to or subjectively feared for his safety. The officer specifically required the defendant to remove her foot to reveal an object. The question in that case was one of probable cause, not founded suspicion of a weapon. Additionally, in that case the prosecutor conceded that the defendant had standing. The court acknowledged that in some circumstances a passenger may not have standing, citing Sears v. State, 493 So.2d 99 (Fla. 4th DCA 1986), one of the cases cited by the Fourth District in Fontana. There is no indication that the second district felt there was a conflict.

Martin v. State, 521 So.2d 260 (Fla. 2d DCA 1988), is also easily distinguishable. The facts of that case are

completely different. Most significantly, it involved a search of appellant's person, not the car.

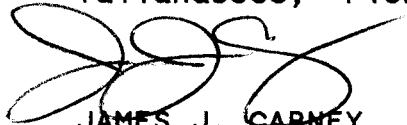
In Jenkins v. State, 567 So.2d 528 (Fla. 5th DCA 1990), the defendant was the driver of the car, not a passenger. The officer involved did not suspect any illegal activity or that the defendant was armed.

CONCLUSION

Based on the preceding argument and authorities, this Court should decline jurisdiction as there is no direct and express conflict.

Respectfully submitted,

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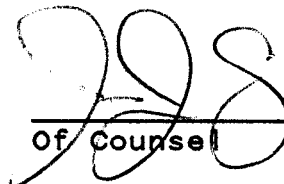


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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Louis Carres, Assistant Public Defender, Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 24th day of December, 1990.

  
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Of Counsel