

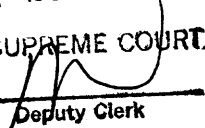
FILED

SID J. WHITE

MAR 25 1991

CLERK, SUPREME COURT

By


Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

KEVIN NELMS,

Petitioner

Vs.

CASE NO. 77,602

STATE OF FLORIDA,

Respondent

PETITIONER'S BRIEF ON JURISDICTION

CHARLES W. MUSGROVE
Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, Florida 33406
407/968-8799
Florida Bar No. 095137

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Circuit Court in and for Palm Beach County, Florida, and the Appellant in the District Court of Appeal, Fourth District. Respondent was the Prosecution in the Circuit Court and the Appellee in the District Court. The parties will be referred to as they appear before this Court.

The symbol A followed by a number will refer to the Appendix to this Brief.

STATEMENT OF THE CASE AND FACTS

Appellant was convicted of murder in the first degree, and sentenced to life in prison without possibility of parole for 25 years (A1-1A).

His Motion to Vacate was ultimately amended to allege only that his jury was not drawn countywide, and that his pretrial challenge was improperly denied (A5-6). The trial Judge denied the Motion, finding the issue had not been raised before trial and finding Spencer v. State, 545 So.2d 1352 (Fla. 1989) not to be retroactive (A6-9).

The District Court, which had considered the identical issues in State v. Moreland, 564 So.2d 1164 (Fla. 4DCA 1990), affirmed the denial of relief and cited that decision as authority (A10). Rehearing was timely sought (A11-12), and was denied February 14, 1991 (A13).

By notice filed March 13, 1991, Petitioner seeks discretionary review of the decision in this case.

SUMMARY OF ARGUMENT

The issues in this cause are whether a pretrial motion which includes in its prayer for relief a request in the alternative for a new panel drawn from the same area as the grand jury is sufficient to invoke this Court's Spencer decision, and whether Spencer is retroactive. The identical questions were involved in State v. Moreland, supra, and the District Court relied exclusively on State v. Moreland in affirming the lower Court in this case.

Though this Court does not ordinarily review a per curiam affirmance which cites cases to see if there is a conflict, it does have jurisdiction where the cited case has been reversed by this Court or is pending review in this Court. Since this Court granted review in Moreland on February 28, 1991, and assigned it case number 76,752, this Court does have jurisdiction to review the instant decision.

POINT INVOLVED

THE DECISION OF THE DISTRICT COURT OF APPEAL
HEREIN TO DENY RELIEF TO ONE WHO REQUESTED A JURY
DRAWN FROM THE SAME POOL AS THE GRAND JURY IS IN
DIRECT CONFLICT WITH THIS COURT'S DECISION IN
SPENCER V. STATE, SUPRA

ARGUMENT I

THE DECISION OF THE DISTRICT COURT OF APPEAL
HEREIN TO DENY RELIEF TO ONE WHO REQUESTED A JURY
DRAWN FROM THE SAME POOL AS THE GRAND JURY IS IN
DIRECT CONFLICT WITH THIS COURT'S DECISION IN
SPENCER V. STATE, SUPRA

In Spencer v. State, supra, this Court declared the Palm Beach County Jury District plan invalid on grounds that it denied a fair cross-section of the county and systematically excluded a significant portion of the black population of the county.

Though Judge Mounts did not believe the issue had been raised pretrial, Petitioner did challenge "the Grand Jury Panel brought in to be selected to try this case" (sic)(A14). He prayed in the alternative for "a new panel, drawn in the same manner and from the saem (sic) area as the Grand Jury which returned the indictment" (A15). Such a panel would have been drawn countywide. Moreover, in Spencer this Court did not expressly require a pretrial challenge to justify relief.

Another Circuit Judge in Palm Beach County reached a contrary conclusion. He accepted a similar motion as adequately raising the Spencer issue, and he applied Spencer retroactively. The District Court reviewed that decision in State v. Moreland, supra, and reversed, holding Spencer is not retroactive.

Like Moreland, Petitioner believes his motion was adequate to preserve the issue and that Spencer should be applied to grant him a new trial. The District Court did not disagree with his claim that his motion was adequate. It simply cited to its Moreland decision in a per curiam affirmance.

This Court does not ordinarily examine the cases cited in a per curiam affirmance to see if there is jurisdictional conflict, Dodi Publishing Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). However, when the cited case

is pending review in this Court, this Court has jurisdiction, Jollie v. State, 405 So.2d 418 (Fla. 1981).

Since this Court has now granted review in Moreland, which is pending as case No. 76,752, it also has jurisdiction to review the instant case. It would be incongruous if two decisions from the same Circuit Court involving similar pre-trial motions and identical issues were not both reviewed by this Court and ultimately decided in the same way, based solely on the fact that one received a full-blown decision and the other was only a per curiam decision citing the former. The denial of equal protection would be evident.

CONCLUSION

This Court should accept jurisdiction in this case based on its acceptance of jurisdiction in Moreland, supra, and either set this case for oral argument on June 7, 1991, with Moreland, or else apply whatever decision it reaches in Moreland to this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to DON M. ROGERS, ESQUIRE, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida, 33401, this 20th day of March, 1991.

Charles W. Musgrove

CHARLES W. MUSGROVE
2328 South Congress Avenue
Congress Park - Suite 1D
West Palm Beach, Florida 33406
407/968-8799
Florida Bar No. 095137