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APR 9 1992

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

CASE NO. 79,630

JAMES VON DECK,
Respondent.

Ret.

~~RESPONDENT'S~~ BRIEF ON JURISDICTION

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ATTORNEY

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STATEMENT OF THE CASE

On November 16, 1990, an Information was filed in Circuit Court Case No. 90-19190 CF charging that, on October 24, 1990, Respondent attempted to commit the offense of Murder of a Law Enforcement Officer. (Appendix I, R1401). On March 4-8, 1991, a jury trial was conducted at which Respondent was found guilty of the lesser included offense of Aggravated Assault on a Law Enforcement Officer with a Firearm. On April 4, 1991, Respondent was adjudicated guilty and sentenced to the mandatory minimum sentence of three years imprisonment. (Appendix II, R1552-1555).

Respondent appealed his conviction and sentence to the Fifth District Court of Appeal in Case No. 91-758. On February 7, 1992, that Court filed its opinion reversing Respondent's conviction for Aggravated Assault on a Law Enforcement Officer with a Firearm, because the Information contained no allegation that Officer Huss had a well-founded fear of imminent violence when Respondent shot at him while he was engaged in the lawful performance of his duties. (Appendix III, Opinion of the Fifth District Court of Appeal). The State moved for rehearing on February 20, 1992 citing direct conflict with Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). (Appendix IV, Petition for Rehearing), That Motion was denied by order dated March 6, 1992. On March 30, 1992, the State filed its Notice Invoking Discretionary Jurisdiction and a Motion to Stay Enforcement of Mandate.

STATEMENT OF THE FACTS

On October 24, 1990, Respondent telephoned his wife at her place of employment and informed her that he was getting a gun and coming over there to kill her. (R517-519). She immediately called 911. (R515). Officer Pollack was dispatched with his partner Officer Greene to Respondent's residence. (R535-540). Respondent attempted to elude the police in his car. (R541). Corporal Huss said he was dispatched to back up Officer Pollack. His marked police vehicle was travelling at approximately 10 to 15 MPH when Respondent's vehicle approached him. Respondent placed a nickle plated short-barreled revolver out the driver's side window, aimed it in the direction of Officer Huss and fired a shot'. Huss said he thought Respondent was going to shoot him and was scared to death. (R562-567, 571, 587). Respondent finally stopped his vehicle after a one-half mile chase and threw two handguns out of the window. One of those guns **matched** the description of the weapon **used** against Corporal Huss. (R543, 544, 545, 571). He was placed under arrest for Attempted **Murder** of a Police Officer. A taped statement was taken from the Respondent and was used against him at his trial. During that statement he admitted firing his revolver "...over the police cruiser..." with the intention of stopping the "...police officers in their tracks...". (R691, 696-697).

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the case subjudice is in direct conflict with the decision of the Fourth District Court of Appeal in Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). (Appendix V). That case held that the allegation that the defendant shot someone satisfies the requirement that the State allege a well-founded fear of imminent violence sufficient to require an instruction on aggravated assault as a lesser included offense of attempted murder.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUBJUDICE IS IN **EXPRESS** AND **DIRECT** CONFLICT WITH THE DECISION OF **THE** FOURTH DISTRICT COURT OF APPEAL IN KIMBROUGH V. STATE, 356 SO.2D 1294 (FLA. 4TH DCA 1978).

In the instant case, the Information alleges that Respondent fired his revolver at a law enforcement officer while that officer was engaged in the lawful performance of his duties (stopping Respondent from killing his wife.) Respondent stated that it was his intention to shoot over the police cruiser to stop "the police officers in their tracks." Respondent never denied the shooting. His defense was basically that he did not intend to kill the police by shooting them, but merely to scare them off.

In Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), the Court said that the allegation that the defendant **shot** at the victim satisfies the requirement that well-founded fear be alleged in the charging document sufficiently to allow instruction on aggravated assault as a lesser included offense of attempted murder. In the case subjudice, the Fifth District Court of Appeal cited Kimbrough, but simply concluded that it is "probably erroneous". The Court held that the allegation that a defendant shot at a police officer in the performance of his duty does not presuppose that such actions would put that officer in well-founded fear of imminent violence.

These two district court decisions **reached** exactly opposite conclusions from virtually identical facts, This is precisely

the type of case which requires review by this Court under Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate **Procedure 9.030(a)(2)(A)(iv)**. See Reaves v. State, 485 So.2d 829 (Fla. 1986).

This is particularly true in light of this Court's recent decision in Pardo v. State, 17 FLW 5194 (Fla. Opinion filed March 26, 1992), which reaffirmed that the decisions of other district courts of appeal represent the law of Florida and are binding on all Florida trial courts unless or until they are overruled by this Court. The trial court in the **case** subjudice **was** bound to follow the law as enunciated by the Fourth District in Kimrough. When the State charges attempted murder of a police officer in the line of duty, it is absurd to require the State to also allege that the police officer who was being shot at was in **fear** of imminent violence. That is especially true where Respondent's defense was that he did not intend to kill the police officers, only put them in **fear** of imminent violence and stop them "in their tracks."

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner prays this honorable court accept jurisdiction to resolve the conflict between these two decisions of the District Courts.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

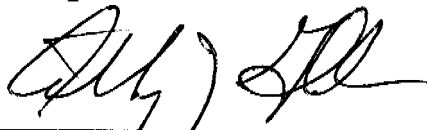


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on Jurisdiction has been mailed to James G. Kontos, Esquire, Law Firm of Daniel S. Ciener, attorney for Respondent, 255 North Grove Street, Suite A, Merritt Island, Florida 32953, this 7th day of April, 1992.



Anthony J. Golden
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