

IN THE SUPREME COURT OF FLORIDA

RANDAL M. PREVATT,
Petitioner,

v.

FSC CASE NO. SC04-607
5TH DCA CASE NO. 5D02-3629

STATE OF FLORIDA,
Respondent.

_____ /

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Petitioner has not cited any Florida cases which are in express and direct conflict with the opinion of the Fifth District Court of Appeal in the instant case nor has he established any other valid basis upon which this Court could exercise its discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution or Florida Rule of Appellate Procedure 9.030(a)(2)(A).

ARGUMENT -- RESTATED

THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUBJUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OF THE CASES CITED BY PETITIONER.

Under Article V, Section 3 (b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.

Petitioner has cited no Florida cases in his jurisdictional brief which are in express and direct conflict with the opinion of the Fifth District Court of Appeal in the instant case, Prevatt v. State, 29 Fla. L. Weekly D280 (Fla. 5th DCA Opinion filed January 23, 2004). (Appendix I). The four cases he has cited all stand for the general proposition that the out-of-court testimony of an unavailable witness may be introduced at trial where there is sufficient indicia of trustworthiness.

In Carpenter v. State, 785 So. 2d 1182 (Fla. 2001), the Supreme Court found that the trial court judge had abused his

discretion in excluding testimony from two inmates concerning out-of-court inculpatory statements made by a third party because they would not fully exonerate the defendant. The Court found that, in determining whether there is sufficient corroboration for the trustworthiness of this testimony to allow for its admission, the trial court judge should not have assessed the credibility of these witnesses, leaving that matter to the jury, and concluded that there was sufficient corroboration for its admission.

In Manugeri v. State, 460 So.2d 975 (Fla. 3rd DCA 1984), the Court said that both exculpatory and inculpatory statements must be supported by corroborating circumstances which clearly indicate their trustworthiness and concluded that the murder victim's girlfriend was properly allowed to testify that he told her he had stolen two kilograms of cocaine from the defendant's airplane the day before his murder. In Perry v. State, 675 So.2d 976 (Fla. 4th DCA 1996), the Court cited Manugeri, in finding that statements made by the defendant's companion that she had done the shooting should have been admitted where there were corroborating circumstances clearly indicating the trustworthiness of the statement. The Court said: "...since there was other evidence pointing to Powell as being the shooter, the trustworthiness requirement was satisfied."

In Baker v. State, 336 So.2d 364 (Fla. 1976), after the defendant's conviction on robbery charges, the wife and mother-in-law of one J.E. Johnson came forward and said that he had told them the defendant was innocent. The mother-in-law said Johnson told her he had committed the crime himself. The wife's testimony did not go that far. The Court found that since Johnson's declarations were made in the presence of both his wife and mother-in-law, they were not privileged and, in finding that the defendant was entitled to a new trial, the Court cited Mr. Justice Holmes' dissent in Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed.2d 820 (1913), to the effect that the confession of another that he has committed the crime "...coupled with circumstances pointing to its truth..." would have a very strong tendency to make those outside the court believe the defendant had not committed the crime.

The opinion of the Fifth District Court of Appeal in the instant case is wholly consistent with those four decisions cited by Petitioner for conflict jurisdiction. The trial court judge had only the word of the defendant's mother that Billy Johnson had told her he was going to take the stand and take full responsibility for the victim's death. The District Court cited this Court's opinion in Carpenter in finding that that testimony had not been excluded because of any issue relating to

the mother's credibility, but simply because the defense had offered nothing to corroborate the trustworthiness of the statement. The Court said that such a statement should not be admitted "...when there are serious questions as to its reliability." In all four of the cases cited by Petitioner, there were witnesses or other evidence to corroborate the fact that these statements had in fact been made and that they were reliable.

Here, no one except Petitioner's mother heard Billy Johnson's purported statements. Even if he had intended to take full responsibility for the crime, the other evidence established that that is not what happened. The testimony at trial established that both Petitioner and Billy Johnson had participated together in beating the victim to death. In arguing the motion in limine, defense counsel had characterized these statements allegedly made by the deceased Billy Johnson as merely indicating his intention to shoulder "the bulk of the blame". The eyewitnesses to the beating all testified that both Petitioner and Billy Johnson participated together in beating the much smaller victim to death. Jeff Ballard testified that when he asked Petitioner to break up the fight between Billy Johnson and Keith Parks, Petitioner instead grabbed Keith Parks and punched him four times in the head,

"pretty hard". He never saw Keith Parks hit Petitioner or say anything to him. Melissa Kimberly corroborated Ballard's testimony, saying she saw Petitioner hit the victim three or four times in the face or head area. The medical examiner, Dr Reyes, testified that the victim died from the cumulative effect of the blunt force trauma to multiple areas of his head.

The conclusion of the District Court in the instant case that the statements were properly excluded because the proponent of them had failed to offer any evidence to corroborate their trustworthiness is consistent with all four of the decisions relied upon by Petitioner. He has failed to establish conflict jurisdiction.

In his Jurisdictional Brief, Petitioner also asserts that this Court has jurisdiction over this case because the opinion of the Fifth District Court of Appeal in the case *subjudice* expressly construes the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. That is quite simply not true. The United States Constitution is not mentioned in the opinion and the Court's decision was based upon established principles of Florida state law.

CONCLUSION

Since Petitioner has failed to establish express and direct conflict or any other basis upon which this Court could exercise its discretionary jurisdiction in this case, Respondent respectfully prays this Honorable Court decline to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on Jurisdiction has been delivered to Susan A. Fagan, Esquire, Office of the Public Defender, Counsel for Petitioner, via her basket at the Fifth District Court of Appeal, this 29th day of April, 2004.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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Assistant Attorney General