

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-30

3d DCA Case No. 3D03-2719

DONALD H. WARSHAW

Petitioner,

vs.

THE CITY OF MIAMI FIREFIGHTERS' AND
POLICE OFFICERS' RETIREMENT TRUST

Respondent.

KAREN S. WARSHAW,

Intervenor.

RESPONDENT'S, THE CITY OF MIAMI FIREFIGHTERS' AND POLICE
OFFICERS' RETIREMENT TRUST, BRIEF ON JURISDICTION

On Petition for Review of Decision of the Third District
Court of Appeal Case No. 3D03-2719

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PRELIMINARY STATEMENT

This is a response to a petition to invoke the discretionary review jurisdiction of this Court pursuant to Article V, section 3(b), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A), based on a claim that the Third District Court decision expressly and directly conflicts with a decision of this Court or another District Court or, alternatively, that the decision “impact[s] all public employees in the State.”¹ Respondent submits that this Court does not have jurisdiction to review this case based on Intervenor’s allegations, and alternatively, if the Court determines that it does have jurisdiction, it should decline discretionary review.

The Petitioner, DONALD H. WARSHAW, will be referred to herein as “Petitioner.”

The Intervenor, KAREN S. WARSHAW, will be referred to herein as “Intervenor.”

The Respondent, THE CITY OF MIAMI FIREFIGHTERS’ AND POLICE OFFICERS’ RETIREMENT TRUST, will be referred to herein as “Respondent.”

The Third District Court of Appeal decision will be referred to herein as the “Opinion” and cited as [Op. _].

¹The Intervenor in this action, Karen S. Warshaw, filed a jurisdictional brief based on an express and direct conflict with decisions of this Court and with decisions of other District Courts of Appeal, and thereafter filed a notice of intent to rely on the arguments and authorities set forth in Petitioner’s jurisdictional brief. Therefore, Respondent will address Intervenor’s argument as well as Petitioner’s arguments as set forth in their respective jurisdictional briefs.

STATEMENT OF THE CASE

Respondent disagrees with Intervenor’s recitation of the facts to the extent that Intervenor’s brief includes numerous statements not discernible from within the four corners of the majority Opinion. In determining whether to grant discretionary review jurisdiction, the only facts relevant to this Court’s decision are those contained in the majority decision – neither a dissenting opinion nor an examination of the record can be used to establish jurisdiction. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980); Reaves v. State, 485 So. 2d 829 (Fla. 1986). Thus, Respondent clarifies the facts by limiting them to only those contained in the majority Opinion – none of which references Intervenor’s status as an “innocent ex-spouse” or her entitlement to vested pension funds.

Intervenor is the ex-wife of Petitioner, a former Police Chief of the City of Miami who pled guilty in federal court to one count of mail fraud in violation of 18 U.S.C. § 1341. [Op. 1]. The conviction led to an investigation, and ultimately an administrative hearing, by the City of Miami Firefighters’ and Police Officers’ Retirement Trust Board (“Board”) to determine whether Petitioner’s pension should be forfeited pursuant to section 112.3173, Fla. Stat., which essentially states that any public officer or employee who is convicted of a specified offense prior to retirement shall forfeit all retirement benefits except for his accumulated contributions. [Op. 2-3]. Section 112.3173(2) defines “specified offense” to

include embezzlement of public funds or theft by a public employee or officer from his employer. The Board concluded that Petitioner committed a specified offense and issued an Order forfeiting his retirement benefits. [Op. 3]. Petitioner and the Intervenor appealed the decision. The Third District Court of Appeal affirmed and denied Intervenor's motion for rehearing and motion for rehearing en banc. [Op. 1-2].

At all relevant times, Intervenor was the spouse (or ex-spouse) of Petitioner who was Chief of the City of Miami Police Department. Do the Right Thing, Inc., ("DTRT"), was a not-for-profit corporation whose mission was to assist the City of Miami in recognizing individuals who made significant contributions to the community, and to form an alliance between the Police Department and area businesses for the benefit of children in high crime, disadvantaged areas of the community. [Op. 3-4]. DTRT based its operations at the Police Department, and used the facilities and the uncompensated services of at least one Police Department employee. [Op. 4]. Petitioner was the designated registered agent for service of process at the Police Department. [Op. 4]. Approximately 80-90% of DTRT's annual funding came directly from the City of Miami Law Enforcement Trust Fund. [Op. 4]. As Police Chief, Petitioner used his power to arrange, through the Miami City Commission, for the trust fund money to be transferred to DTRT accounts for use by DTRT for city purposes. [Op. 4]. Petitioner used part of the

funds which had been transferred to the DTRT account to pay personal, unauthorized expenses of a period of years. [Op. 4].

DTRT was mandated to use the money transferred from the trust fund – city (public) funds – to carry out city functions. [Op. 5]. In this respect, DTRT was essentially an alter ego, or agent, of the City of Miami. [Op. 5]. Thus, although the funds were transferred to DTRT, they never lost their character as public funds because they were always intended for public use. [Op. 5-6].

SUMMARY OF THE ARGUMENT

Intervenor failed to substantiate her allegation that the Opinion “expressly and directly conflicts with the principles repeatedly set forth by this Court and other District Courts that forfeiture statutes must be strictly construed.” The majority Opinion does not expressly and directly contradict the principle that forfeitures statutes should be strictly construed, and the Opinion is easily reconcilable with the cases cited by Intervenor.

Likewise, contrary to the argument set forth in Petitioner’s brief and adopted by Intervenor, there is no direct and express conflict with Williams v. Smith, 360 So. 2d 417 (Fla. 1978). Smith stands solely for the proposition that Art. II, sec. 8 of the Florida Constitution is not self-executing and requires legislative intervention prior to invoking its forfeiture provision. The Opinion hardly creates

an irreconcilable conflict with Smith and thus, fails to form a basis for invoking this Court's discretionary review jurisdiction.

Moreover, although asserted by the Petitioner in his jurisdictional brief and thereafter adopted by Intervenor, there is no basis for this Court's jurisdiction under the theory that the Opinion "impact[s] all public employees in the State." Respondent presumes that this is an attempt to establish jurisdiction on the grounds that the Opinion expressly affects a class of constitutional or state officers. However, Intervenor's claim fails under this theory. Police officers and public employees with pensions are not considered constitutional or state officers, and even if deemed such, the Opinion merely extends existing case law by applying the specific facts of the case to the applicable law.

ARGUMENT

I. THE OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT CONCERNING STRICT CONSTRUCTION OF FORFEITURE STATUTES.

Respondent does not contest that forfeiture statutes should be strictly construed, and Intervenor erroneously contends that the Opinion states otherwise. Although this Court may have reached a different result had it been the trier of fact in this case, its view surrounding the "correctness" of the District Court's decision is not the measure for jurisdiction. See Mancini v. State, 312 So. 2d 732 (Fla.

1975); Nielsen v. Sarasota, 117 So. 2d 731 (Fla. 1960); Lake v. Lake, 103 So. 2d 639 (Fla. 1958). To accept jurisdiction on this basis, the Court must find that the Opinion announced a point of law which, if permitted to stand, would in effect overrule a former case if it were rendered by the same Court. Thus, if the cases are distinguishable in material facts or if the points of law settled by the cases are not the same, then no conflict can arise. See Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959). This is the precise scenario in the case at bar.

Contrary to Intervenor's argument, the cases cited by her (as well as Petitioner) for this proposition are distinguishable in both law and fact and therefore no direct express conflict results from this Opinion. For example, in the only case cited which is factually similar to the case at bar, Williams v. Christian, 335 So. 2d 358 (Fla. 1st DCA 1976), the issue was whether a state officer's adjudication of guilt under section 838.06, Fla. Stat., (receipt of unauthorized compensation) constituted a finding of guilt of the offense of "bribery in connection with the employment" as contemplated by section 121.091(5)(f), Fla. Stat., for purposes of forfeiture of his retirement benefits. Id. at 359. The court analyzed and compared the elements of bribery with the elements of acceptance of unauthorized compensation and determined that since the defendant's conduct did not equate to "bribery" as contemplated by the statute, forfeiture was not required. Id. at 360-61. The Court chose not to look outside the information contained in the plea agreement – but it

never alluded to a prohibition against considering other evidence. The holding in Christian is entirely valid today, and nothing in the Opinion changes that legal proposition. The Opinion merely recognizes that it may be prudent for a court to afford an administrative board the discretion to look outside the four-corners of the charging document and determine, by clear and convincing evidence, whether or not a “specified offense” was in fact committed for purposes of invoking section 112.3173.

In essence, the District Court below scrutinized the language of section 112.3173 and the facts in the case, and found that Petitioner’s conduct constituted the specified offense of embezzlement and/or theft of public funds as contemplated by statute. The fact that the Third District Court interpreted “public funds” differently than Intervenor would have wished, and considered facts adduced at the administrative hearing that were not offered in the Superseding Information, does not contradict Christian nor any of the other cases cited by Intervenor, nor does it constitute “broad construction” of the forfeiture statute.

II. THE OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH WILLIAMS v. SMITH IN FINDING THAT PETITIONER COMMITTED A SPECIFIED OFFENSE²

Intervenor's allegation that the Opinion expressly and directly conflicts with Williams v. Smith, 360 So. 2d 417 (Fla. 1978) is tenuous at best. Respondent agrees that Smith stands for the proposition that Art. 2, section 8 of the Florida Constitution ("Ethics in government") was not self-executing and, based on the language of the statute and the intent of the framers, that implementing legislation prior to invoking its forfeiture provision was required. 360 So. 2d at 419-20. However, Smith holds nothing more.

The legislature did, in fact, respond with implementing legislation by enacting, *inter alia*, section 112.3173 and defining "specified offense" as referred to therein. Further, it provided for an administrative hearing to be conducted by the agency charged with administration of the statute (rather than a judicial proceeding) to determine if a specified offense had been committed for purposes of forfeiture of pension benefits.³

² Intervenor adopted the argument of express and direct conflict with Williams v. Smith from Petitioner's jurisdictional brief and presented no further argument concerning this issue in her jurisdictional brief. Notwithstanding, Respondent will proceed as though the argument were in fact presented by Intervenor.

³"The administrative construction of a statute by the agency charged with its administration should not be disregarded or overturned by a reviewing court except for the most cogent reasons and unless clearly erroneous." See *Metropolitan Dade County v. Department of Environmental Regulation*, 714 So. 2d 512, 515 (Fla. 3d
FTL:1547613:1

The gravamen of Intervenor’s argument is that the Third District Court did not construe the statute and its terms as urged by Intervenor. The Opinion does not deviate from the decision in Smith – much less create an express, direct conflict which serves as a basis for this Court’s jurisdiction. As stated by this Court in Florida Power & Light Co., “[t]he constitutional objectives can be achieved and the creation of the district courts justified only if we recognize that the primary function of this court, particularly in the area of ‘conflicts’ here involved, is to stabilize the law by a review of decisions which form patently irreconcilable precedents.” 113 So. 2d at 699. Accordingly, this Court is without jurisdiction on the grounds of an express and direct conflict.

III. THE DECISION BELOW DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS BECAUSE POLICE OFFICERS AND “PUBLIC EMPLOYEES” ARE NOT CONSTITUTIONAL OR STATE OFFICERS AND NEITHER CLASS IS EXPRESSLY AFFECTED BY THE OPINION⁴

Finally, Intervenor urges this Court to accept jurisdiction because the class affected by the Opinion is “all public employees holding pensions” and that such a class is “broader than a class of constitutional or state officers.” However,

DCA 1998) citing *Department of Health and Rehab Services v. A.S.*, 648 So. 2d 128, 132 (Fla. 1995).

⁴ As set forth above, Intervenor adopted the argument that the Opinion affects a class of constitutional or state officers from Petitioner’s jurisdictional brief and presented no further argument concerning this issue in her jurisdictional brief. However, Respondent replies as though the argument were in fact presented by Intervenor.

FTL:1547613:1

Intervenor is unable to cite to any authority for the proposition that her claim somehow affords this Court discretionary review jurisdiction.

In anticipation that this Court may consider, *sua sponte*, the status of police officers to determine possible jurisdiction, Respondent notes that in Hakam v. City of Miami Beach, 108 So. 2d 608 (Fla. 1959), the Court stated that “it is quite obvious that a police officer of a municipal corporation is not a ‘constitutional or state officer’ as contemplated by the germane constitutional provision.” Id. at 609. Further, undersigned counsel was unable to locate any cases (and Intervenor failed to cite any) which explicitly or implicitly refer to a class “broader than a class of constitutional or state officers” as giving rise to a basis for this Court’s discretionary jurisdiction. In essence, Intervenor is requesting this Court to “broadly” construe the Constitution (and the relevant case law) and merely “infer” that the framers intended that a class “broader than a class of constitutional or state officers” serve as a basis for jurisdiction – notwithstanding that the framers had the opportunity to include such language, but chose not to.

Respondent submits that even if this Court were to determine that public employees with pensions or police officers constitute a “class” as contemplated by the Art. V, section 3(b)(3), Fla. Const., the Opinion does not expressly affect such a class. As outlined above, the Opinion merely applies the terms of the statute to

the specific facts of the case in determining that Petitioner committed a specified offense for purposes of section 112.3173.

CONCLUSION

Based on the foregoing arguments and authorities, this Honorable Court should deny Intervenor's request and refuse to accept jurisdiction over this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **Ivy R. Ginsberg**, The White Building, Suite 200, One N.E. 2d Avenue, Miami, Florida 33132; **Karen Warshaw**, 8351 S.W. 124th Avenue, Unit 105, Miami, Florida 33183; **Martin Barry Goldberg**, 100 SE 2nd Street, Suite 1200, Miami, Florida 33131; **Justin C. Fineberg**, 100 SE 2nd Street, Suite 1200, Miami, Florida 33131 and **Stephen Cypen**, Cypen & Cypen, 825 Arthur Godfrey Road, Miami Beach, Florida 33140 on this 4th day of October, 2005.



BRUCE L. UDOLF

CERTIFICIATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief, filed on behalf of the City of Miami Firefighters' and Police Officers' Retirement Trust is in compliance with Fla. R. App. P. 9.210.



BRUCE L. UDOLF

APPENDIX

Opinion filed September 15, 2004 (15 pages)

Order Denying Appellant's Motion for Rehearing (1 page),
December 2, 2004

Order Denying Intervenor's Motion for Rehearing (1 page),
December 3, 2004.