IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC05-1249

DCA CASE NO.4D04-1092

LAWRENCE TIMOTHY REID,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State. In this brief, the symbol "A" will be used to denote the appendix attached hereto.

STATEMENT OF THE CASE AND FACTS

Respondent generally accepts Petitioner's Statement of the Case and Facts as set forth in his brief on jurisdiction for purposes of this Court's decision on whether to accept or decline jurisdiction in this case.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal does not expressly and directly conflict with the decisions of this Court, the Fourth District Court of Appeal, other District Courts of Appeal or the United States Supreme Court.

ARGUMENT

POINT I (RESTATED)

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IS NOT IN DIRECT CONFLICT WITH JONES V. STATE, 842 SO. 2D 889 (FLA. 2D DCA 2003); METROPOLITAN DADE COUNTY V. FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, 714 SO. 2D 512 (FLA. 3D DCA 1998); AND THUNDERBIRD DRIVE-IN THEATRE, INC. V. REED, 571 SO. 2D 1341 (FLA. 4TH DCA 1990).

Petitioner alleges that the decision of the Fourth District Court of Appeal in this case, Reid v. State, 898 So. 2d 248(Fla. 4th DCA 2005), directly conflicts with Jones v. State, 842 So. 2d 889 (Fla. 2d DCA 2003), Metropolitan Dade County v. Florida Department of Environmental Protection, 714 So. 2d 512 (Fla. 3d DCA 1998), and Thunderbird Drive-In Theatre, Inc. v. Reed, 571 So. 2d 1341 (Fla. 4th DCA 1990). Respondent disagrees.

It is well settled that in order to establish conflict jurisdiction, the decision sought to be reviewed must expressly and directly create a conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of law. Article 5, Section 3(b)(3) Fla. Const.; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). This Court does not have discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(iv) to review the instant case.

In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction, 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 as mandatory authority. See generally Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[if] the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then conflict cannot arise." Id. at 887. "Obviously two cases can not be in conflict if they can be validly distinguished." Morningstar v. State, 405 So. 2d 778, 783 (Fla. 4th DCA 1981), Anstead J. concurring, affirmed, 428 So. 2d 220 (Fla. 1982). See also Dept. of Health and Rehabilitative Services v. National Adoption Counseling Services, Inc., 498 So. 2d 888 (Fla. 1986)("inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction.").

The decision in this case **does not** directly and expressly conflict with Petitioner's cases. Those cases are factually distinguishable from this case. In Jones, the appellate court reversed an order denying Jones's motion to suppress. Id. The deputy testified that he saw Jones on horseback riding at a full speed gallop down the street. The deputy did not see Jones actually impede traffic or endanger anyone. The deputy stopped Jones for failing to have lights or reflectors and for operating without regard for public safety. After the stop, Jones dismounted, took off his jacket, and dropped it on the ground. Jones had a rifle on his saddle. When the deputy asked Jones whether he had any other weapons on him, Jones lifted his pants leg to reveal a knife. Jones had a crack pipe in his jacket. Id.

In Metropolitan Dade County, the county appealed an order of the Florida Department of Environmental Protection (FDEP) approving the eligibility of Sekoff Investments, Inc. (Sekoff), to participate in the Florida Drycleaning Contamination Cleanup Program. FDEP granted Sekoff eligibility to participate in the program. The county petitioned FDEP for an administrative hearing to contest Sekoff's eligibility. The hearing officer recommended that Sekoff be found eligible to participate in the program. The appellate court affirmed.

In Thunderbird, Thunderbird Drive-in Theatre, Inc. and Florida Drive-In Theatre Management, Inc. (Theatre) appealed from a final judgment and order taxing costs arising out of a suit for personal injuries resulting from a motor vehicle accident. There, a motorcycle collided with a pickup truck near the entrance to the Thunderbird Drive-in Theatre. The driver of the motorcycle was severely injured. The motorcyclist contended at trial, inter alia, that the Theatre was negligent in the design and maintenance of the entrance to the theatre and that the resulting traffic congestion on Sunrise Boulevard without hiring any police personnel to improve traffic flow constituted a violation of section 316.2045(1), Florida Statutes. Id.

In the instant case, Petitioner parked his car in the road near an intersection and caused another vehicle to drive around his car, thus actually impeding the flow of traffic. Reid v. State, supra. The police officer lawfully seized cocaine after discovering it in plain view when Petitioner was ordered out of his car during the course of the lawful traffic stop for obstructing traffic. Id. Thus, the facts of the case at bar, are completely different from the facts of Jones, where Jones was seen riding his horse in the street, but was not seen to impede traffic; Metropolitan Dade County, which is a civil, administrative case dealing with the Florida Drycleaning

Contamination Cleanup Program; and Thunderbird Drive-in Theatre, which is a civil personal injury case. Thus, Petitioner's cases do not expressly and directly conflict with the instant case.

POINT II (RESTATED)

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IS NOT A DIRECT AND EXPRESS CONFLICT WITH R.H. V. STATE, 671 SO. 2D 871 (FLA.3D DCA 1996), AND PENNSYLVANIA V. MIMMS, 434 U.S. 106 (1977).

Petitioner also claims that the Fourth District Court of Appeal's decision is in direct and express conflict with R.H. v. State, 671 So. 2d 871 (Fla. 3d DCA 1996), and Pennsylvania v. Mimms, 434 U.S. 106 (1977). Respondent disagrees.

In R.H., R.H. was a passenger in a vehicle stopped by an officer for going through a stop sign. The officer gave the driver a warning about the stop sign offense and a citation for violating a driver's license glasses requirement. During this process, R.H. continued to mouth off at the officer. The officer finally ordered R.H. out of the car. As R.H. got out in response to the command, he dropped a clear plastic bag of cocaine. R.H. pled nolo to possession. Id.

In Mimms, after police stopped Mimms's car for being operated with an expired license plate, one officer asked Mimms to step out of the car and produce his license and registration. As Mimms got out, a large bulge under his jacket was noticed by

the officer, who then frisked Mimms and found a loaded revolver. Mimms was indicted for carrying a concealed weapon and unlicensed firearm.

Here, Petitioner parked his car in the road near an intersection and caused another vehicle to drive around it, thus impeding the flow of traffic. Thus, the officer lawfully ordered Petitioner out of the car. Also, Reid was the driver and not a passenger. This case is factually distinguishable.

POINT III (RESTATED)

THE FOURTH DISTRICT COURT OF APPEAL'S DECISION IS NOT IN DIRECT CONFLICT WITH ENSOR V. STATE, 403 SO. 2D 349 (FLA. 1981), JORDAN V. STATE,664 SO. 2D 275 (FLA. 5TH DCA 1995)[1], DOCTOR V. STATE, 596 SO. 2D 442 (FLA. 1992) AND CARROLL V. UNITED STATES, 267 U.S. 132 (1925).

Petitioner alleges that Reid also conflicts with Ensor v. State, 403 So. 2d 349 (Fla. 1981), Doctor v. State, 596 So. 2d 442 (Fla. 1992), and Carroll v. United States, 267 U.S. 132 (1925). Respondent disagrees. In Ensor, officers spotted a car exiting a parking lot following some motorcycles. The car proceeded ten blocks without its headlights on. The officers

[1] Undersigned counsel has been unable to find the case of Jordan v. State, 664 So. 2d 275 (Fla. 5th DCA 1995), as cited in Petitioner's brief on page 8. Apparently, this case as cited does not exist. Undersigned counsel has contacted Petitioner's counsel in this matter, but the correct case citation was never determined. Therefore, Respondent will be unable to address Petitioner's claim as to Jordan v. State.

signaled the car to pull over. The car proceeded another two blocks before stopping. The officers pulled behind it and instructed the occupants to step out. Ensor was the passenger. One officer saw a part of a white object protruding from under the passenger floor mat. The officer determined the object to be a pistol and retrieved it. Ensor was charged with carrying a concealed weapon.

In Doctor, an unmarked scout vehicle passed a vehicle owned by Doctor and in which he was a passenger. Five miles down the road, a highway patrol cruiser stopped Doctor's vehicle, citing a broken taillight. Id. Because the windows were heavily tinted, the trooper asked the occupants to exit the car, and as Doctor exited the car, he attempted to hide the front of his body by walking sideways. Id. The trooper then noticed a bulge in Doctor's groin area approximately eight inches long by four inches wide. The trooper alerted another deputy, who also saw the bulge and thought it might be a weapon. The deputy placed Doctor against his car and told him to remove whatever was in his pants. Id. When Doctor failed to comply, the deputy performed a pat-down and realized the bulge was not a weapon. Instead, he felt what he believed to be cocaine. Id.

In Carroll, the defendants were indicted and convicted for transporting in a car whiskey and gin, in violation of the

National Prohibition Act. The defendants alleged that the two bottles found in their car after a search violated the Fourth Amendment. Id. The Supreme Court held that the agents had ample reason to believe defendants' vehicle contained illegal liquor because the defendants were known to transport liquor in that vehicle, were recognized by the agents, and were on a route known for illegal liquor traffic. Those circumstances provided sufficient probable cause to search the vehicle. Id.

Ensor, Doctor, and Carroll are factually distinguishable from the case at bar. Petitioner parked his car in the road near an intersection and caused another vehicle to drive around Petitioner's car, thus actually impeding the flow of traffic. It was thus lawful for the officer to order Petitioner out of the car. Also, Reid was the driver and not a passenger. Reid, supra. Thus, the facts in the instant case are distinguishable from Ensor, Doctor, and Carroll.

CONCLUSION

Respondent respectfully requests this Court to DECLINE to accept jurisdiction to review the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by U.S. Mail to: MARISA TINKLER MENDEZ, ESQ., counsel for Petitioner, 901 Ponce Deleon Blvd., Suite 304, Coral Gables, Florida 33134, on September _____, 2005.

_____
Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on September _____, 2005.

_____
MYRA J. FRIED

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LOWER COURT NO. 4D04-1092

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RESPONDENT'S APPENDIX

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App. A.....Reid v. State, 898 So. 2d 248(Fla. 4th DCA 2005).