SUPREME COURT OF FLORIDA

TRACIE ANN ELDER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Supreme Court Case: SC07-1512
District Court Case: 2D06-771
Second District

ON EXPRESS AND DIRECT CONFLICT BETWEEN DECISIONS OF THE DISTRICT COURTS OF APPEAL FOR THE SECOND AND FIRST DISTRICTS ON THE SAME QUESTION OF LAW

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner Tracie Ann Elder was the Defendant and Respondent, The State of Florida had brought charges against Petitioner in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, the Honorable Judge Debra Behnke presiding.

The Appendix attached hereto contains the decision of the Second District Court of Appeal.

STATEMENT OF FONT SIZE AND STYLE

This Brief was prepared using 14 pt. Times New Roman.

STATEMENT OF THE CASE AND FACTS

Tracie Ann Elder was charged in the Circuit Court for Hillsborough County, Florida under Fla. Stat. § 316.027(1)(b) (2004), for leaving the scene of a crash resulting in the death of a person. Elder filed a motion to dismiss the information pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). The trial court granted the motion to dismiss, the State appealed the dismissal, and the Second District Court of Appeal reversed the dismissal of the information. *State v. Tracie Ann Elder*, 2007 Fla. App. LEXIS 10668, 32 Fla. L. Weekly D1666 (Fla. 2DCA July 11, 2007), a copy of which Opinion is included in the Appendix attached hereto. The facts the subject of the (c)(4) motion to dismiss may be summarized by the statement that, although Petitioner Elder's car did not come in contact with the automobile of the decedent, Elder's driving caused the decedent to swerve, drive off of the road and flip over, which resulted in the death of decedent Lewis.

Elder's basic assertion in the (c)(4) motion was that a motorist cannot be charged with leaving the scene of a crash where there was no actual contact between the defendant's vehicle and another vehicle. The trial court relied in granting the motion to dismiss on *C.J.P. v. State*, 672 So. 2d 62 (Fla. 1st DCA 1996), concluding that the requirements of Fla. Stat. § 316.027(1)(b) had not been met.

Notice to Invoke Discretionary Jurisdiction was received and filed in the Second District Court of Appeal on August 8, 2007, together with the filing fee.

ISSUE RE JURISDICTION

WHETHER THE DECISION IN *STATE V. ELDER* EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEAL IN *C.J.P. V. STATE*, 672 So. 2d 62 (FLA. 1ST DCA 1996), THEREBY CONFERRING JURISDICTION UPON THIS COURT PURSUANT TO ART. V, § 3(B)(3), FLA. CONST.

Standard of Review

The standard of review is as stated in the above Issue Re Jurisdiction.

SUMMARY OF THE ARGUMENT

The argument as follows is brief, and Petitioner believes that a summary of the same would not assist the Court.

ARGUMENT

Attached to the opinion of the Second District Court of Appeal in question herein is that court's order granting Petitioner Elder's motion for rehearing and substituting the opinion of July 11, 2007 for a previous opinion dated December 20, 2006, which was withdrawn, said order of July 11, 2007 also providing that Petitioner's motion for certification of conflict was denied. The *Elder* decision in the Second District stated that the decision of the First District in *C.J.P. v. State* was distinguishable.

First of all, this Court has on many occasions exercised conflict jurisdiction under circumstances wherein and whereby neither or none of the district court opinions have certified that there was an express and direct conflict. See, e.g., *Cuervo v. Florida*, 2007 Fla. LEXIS 1229, 32 Fla. L. Weekly S469 (Fla. July 12, 2007). In the latter case, this Court found express and direct conflict between decisions, not based upon any certification, but based upon the proper application of the law to the facts involved in the cases. Based upon application of the proper law to district court opinions, this Court in *Cuervo* quashed the decision of the Fifth District in *Cuervo v. State*, and approved the opinion in *Dooley v. State*, 743 So. 2d 65 (Fla. 4th DCA 1999). Similarly, Petitioner Elder believes there is an express and direct conflict between the decisions herein of the Second District and in *C.J.P. v. State*.

The statute involved in the *Elder* decision is Fla. Stat. § 316.027(1)(b), (2006), which provides as follows:

> The driver of any vehicle involved in a crash resulting in the death of any person must immediately stop the vehicle at the scene of the crash, or as close thereto as possible, and must remain at the scene of the crash until he or she has fulfilled the requirements of s. 316.062. Any person who willfully violates this paragraph is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In the conflicting First District decision of *C.J.P. v. State*, relied upon by the trial court below in dismissing the information, there also had been a crash, and C.J.P.'s car was at the scene of the crash, but not physically impacted by the other car which crashed. C.J.P. left the scene of the crash in his car, and was charged with failure to comply with Fla. Stat. § 316.027, (2006). The First District stated that the State's burden concerning the charges, described by that court as a "leaving the scene of an accident with injuries" charge, was to prove that (1) C.J.P. was involved in an accident, (2) C.J.P. knew, or should have known, that injuries had occurred, and (3) C.J.P. willfully left the scene of the accident without complying with the requirements of Fla. Stat. § 316.062, (2006) (Duty to give information and render aid). The First District held as follows:

> Ms. Johns' vehicle was the only one involved in the "accident." To establish culpability under section 316.027, Florida Statutes (1993), the prosecution had to prove, in addition to C.J.P.'s failure to remain at the scene, that he was "the driver of any vehicle *involved in an accident* resulting in injury...of any person." (Emphasis added). The state failed to satisfy its burden as to the element of "involvement." Because C.J.P. was not the driver of the vehicle involved in the accident, we need not address what the evidence showed concerning victim injury.

The italics "*involved in an accident*" were added by the First District in its decision.

The Second District distinguished *C.J.P.* "because of Elder's status of the driver of a car at the time of the crash", apparently adopting the State's argument below that the First District opinion in *C.J.P.* was based upon the fact that *C.J.P.* wasn't a driver, i.e., he was out of his car, at the time of the crash. But it is obvious from the above quote from the First District that the Court there held that *C.J.P.* was not "involved in an accident" not because he wasn't a driver, but "Because C.J.P. was not the driver of the vehicle involved in the accident…". The First District held that *C.J.P.* was not involved in an accident because his vehicle was not impacted.

Although the Second District in *Elder* cited some out-of-state cases concerning similar statutory provisions, none of those cases cited dealt with the Florida doctrine of lenity. Fla. Stat. § 775.021(1) (2006) provides as follows:

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

As held in *Clement v. State*, 895 So. 2d 446 (Fla. 2d DCA 2005), statutes creating and defining crimes cannot be extended by construction or interpretation to punish an act, however wrongful, unless clearly within the intent and terms of the statute. The ambiguity or confusion as to whether Elder's vehicle had to be physically

involved in a crash to be within the statute in question should have been construed favorably to the accused in the Second District proceeding below, since § 775.021(1) provides for strict construction of criminal offenses defined by statute, and when the language is susceptible of differing constructions, the language is construed most favorably to the accused.

The Second District opinion upon its face is perhaps misleading, since it indicates that the word "involved" was in question in the case cited, *Francis v. State*, 808 So. 2d 110 (Fla. 2001). Upon reading of the *Francis* decision it becomes obvious that the Second District was merely citing the general proposition that a word of common usage, not defined in a statute, should be construed in its plain and ordinary sense, and the precise word "involved" was not in issue in the *Francis* case.

Petitioner submits that the Second District opinion with regard to the common usage of the word "involved" does not square with the result reached in *C.J.P. v. State*. This Court in *State v. Burris*, 875 So. 2d 408 (Fla. 2004), a case construing language in a criminal statute, held that, when a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent; instead, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a

result clearly contrary to legislative intent. In *C.J.P. v. State*, the defendant's vehicle was at the location of the crash of another automobile, but was held to be a vehicle not involved in the crash. *C.J.P.* realized that common usage of the word "involved" would yield an unreasonable result. Although not articulated, it might reasonably be assumed that the *C.J.P.* court could envision that there could be quite a number of circumstances wherein an automobile might be at the location of a crash, but not be physically impacted by any crash and therefore not "involved" in the crash. For instance, if A slams on his brakes for no reason, and B, following A, must necessarily slam on his brakes, and C swerves to avoid a rear end collision with B, does the statute contemplate that B is a person "involved" in a crash to the extent of having to stop and render aid? The point is, there is an ambiguity and the statute should describe what "involvement" in an accident is, and not leave criminal punishment dependent upon a case-by-case analysis of the driving conduct of each driver whose vehicle is at or near the scene of a crash. Petitioner submits that the *C.J.P.* decision reflects the proper way to treat the "involvement" language in the statute, whereas the Second District decision in *Elder* does not.

CONCLUSION

The Court should exercise its conflict jurisdiction and resolve the conflict between the appellate districts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Filing has been furnished U.S. Mail to Bill McCollum, Attorney General c/o Timothy A. Freeland, Assistant Attorney General, Concourse Center IV, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607 this _____ day of August, 2007.

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