

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-610

DCA NO. 3D05-39

TRACY MCLIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BILL McCOLLUM
ATTORNEY GENERAL

LINDA S. KATZ
Assistant Attorney General
Florida Bar No. 0672378

RICHARD L. POLIN
Florida Bar No. 0230987
Criminal Appeals Bureau Chief, Miami
Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 650
Miami, Florida 33131
(305) 377-5441

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal, Third District. Petitioner, TRACY MCLIN, was the Defendant in the trial court and the Appellant in the District Court of Appeal. In this brief, Petitioner will be referred to as MCLIN and the Respondent will be referred to as the State.

STATEMENT OF THE CASE AND FACTS

McLin filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, alleging newly discovered evidence based upon recanted testimony of a witness, Jose Saldana. After its denial and affirmance on appeal, this Court remanded the matter for an evidentiary hearing. McLin v. State, 827 So. 2d 948, 958-59 (Fla. 2002). On remand, the motion came before a successor judge who conducted a two-day evidentiary hearing where she heard testimony from Saldana and from Detective Bogen, the lead detective on the case. The court also reviewed the trial transcript and the transcript of an evidentiary hearing the predecessor judge had conducted on that portion of McLin's Rule 3.850 motion which alleged ineffective assistance of trial counsel. The trial court ruled that Saldana's testimony was not credible and was entitled to no

weight. Accordingly, the trial court entered a written order denying relief. McLin, 949 So.2d 1123 - 1124 (Fla. 3rd DCA 2007). McLin appealed the denial to the Third District Court of Appeal. In its opinion, the Third District stated that it is to defer to the trial court's findings of fact regarding the credibility of witnesses and the weight assigned to the evidence. The lower court held that the findings were supported by competent substantial evidence, so they would not substitute their judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court. Id at 1123-1124.

McLin argued that the trial court applied the wrong legal standard in considering newly discovered evidence. In support of his argument, he relied on Lee v. State, 899 So. 2d 348, 354-55 (Fla. 2d DCA 2005), and Light v. State, 796 So. 2d 610, 617 (Fla. 2d DCA 2001) for the proposition that a trial court must evaluate the probable impact of the newly discovered evidence on the jury, and may not make its own credibility determination of the witness' truthfulness. The lower court held that McLin's argument was foreclosed by this Court's opinion which remanded the subject case and stated, "Florida law treats recantations with suspicion, and requires a new trial only if the court is

satisfied that the recantation is true and that the witness's testimony will change to such an extent as to render probable a different verdict." McLin, 827 So. 2d at 955. The lower court also pointed out the portion of this Court's opinion which stated that the claim of ineffective assistance of counsel would need to be revisited "if Saldana testifies consistently with his affidavit and the testimony is determined to be credible"). McClin at . The lower court held that this Court's opinion in McLin specified that the credibility determination was to be made by the trial court.

The lower court specifically held that McLin's reliance on the decisions in Lee and Light was misplaced, as neither case involved recantation testimony or a claim that the testimony of a newly discovered witness was wholly unworthy of belief. Accordingly, the lower court affirmed the trial's court's denial of his motion for postconviction relief after an evidentiary hearing. McLin, 1123-1124.

QUESTIONS PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SECOND DISTRICT DECISIONS OF Lee v. State, 899 So. 2d 348 (Fla. 2d DCA 2005) and Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001)? (REPHRASED).

SUMMARY OF THE ARGUMENT

The grounds set forth in McLin's brief do not provide the Supreme Court of Florida with jurisdiction to review the Third District Court of Appeal's decision. The lower court's opinion does not expressly and directly conflict with the decisions of Lee v. State, 899 So. 2d 348 (Fla. 2d DCA 2005) or Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001), as neither of case involves recantation testimony or a claim that the testimony of a newly discovered witness was wholly unworthy of belief.

ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF Lee v. State, 899 So. 2d 348, (Fla. 2d DCA 2005) and Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001). (REPHRASED).

McLin claims that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The Court has explained express and direct conflict as appearing within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). The State maintains that the Court is without jurisdiction to

review this decision on the grounds set forth in McLin's brief, as no such express and direct conflict exists.

McLin's brief improperly contains and argues facts that are not contained within the four corners of the lower court's opinion. When preparing a jurisdictional brief based on alleged decisional conflict, the only relevant facts are those facts contained within the four corners of the decisions allegedly in conflict. The Court is not permitted to base conflict jurisdiction on a review of the record.¹ Reaves. Accordingly, this Court has specifically stated that "it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record". Reaves at 830, footnote 3.

Nevertheless, in support of his claim of jurisdiction, McLin argues that the lower court's opinion is in conflict with Lee v. State, 899 So. 2d 348 (Fla. 2d DCA 2005) and Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001), which he relies on for the general proposition that the trial court's subjective credibility determination is limited when determining whether newly discovered evidence would have a reasonable probability of

¹ McLin does not provide any citations for the lengthy facts contained in the statement of the facts and the argument, but it appears that the facts set forth in his brief come from the prior decisions as well as the record below and the record from prior appeals.

yielding a different result. McLin pointed out that Lee compared the role of the trial court in the post conviction review of a newly discovered evidence claim to that in a claim of ineffective assistance of counsel for failure to investigate and call eyewitnesses. McLin went on to quote a portion of Lee for the proposition that the trial judge is not just examining whether they believe the evidence presented as opposed to contradictory evidence presented at trial, but whether a reasonable jury may have believed it.

As stated in the Third District's opinion below, unlike the case at bar, neither Lee or Light involved recantation testimony or a claim that the testimony of a newly discovered witness was wholly unworthy of belief. McLin, 1123-1124. Instead, Light involved the claim of ineffective assistance of trial counsel for failing to investigate and call crime scene witnesses. The claim in Lee was ineffective assistance of trial counsel for failing to investigate the need for, or actually obtain, an expert witness. Clearly, the claim involved in the case at bar is factually and procedurally distinguishable from Light and Lee. Thus, there can be no express or direct conflict for the purpose of establishing jurisdiction.

Additionally, McLin's argument is contrary to the express language of this Court in its prior opinion in McLin, in which

the Court specifically stated that recantations are treated with suspicion and require a new trial "**only if the court is satisfied that the recantation is true** and that the witness's testimony will change to such an extent as to render probable a different verdict." McLin 827 So.2d at 955. (emphasis added).

Further, in the same opinion, this Court also stated that an appellate court will not substitute its judgment for that of the trial court on questions of fact or the credibility of the witnesses, as well as the weight to be give to the evidence by the trial court, as long as the trial court's findings are supported by competent substantial evidence. McLin at 954, footnote 4 (citations omitted). McLin attempts to diminish the finding of the trial court by stating that the judge who heard Saldana's testimony did not hear Menzie's testimony. However, the Third District's opinion specifically pointed out that the successor judge reviewed the trial transcript and the transcript of an evidentiary hearing held on McLin's ineffective assistance of counsel claim. Thus, there is no basis to attack the findings of the trial court.

The existence of additional proof that McLin's argument is contrary to the opinion of this Court is set forth in the portion of this Court's McLin opinion which addressed the second claim, which was a claim of ineffective assistance of counsel.

In doing so, the Court stated " . . . the evaluation of the newly discovered evidence claim will be intertwined with this ineffective assistance of counsel claim because, if Saldana testifies consistently with his affidavit **and the testimony is determined to be** credible, the reverse Williams rule evidence would establish that Menzies and Saldana who *the night before the murder in question* used the murder weapon to commit a robbery. McLin at 959. (bolded emphasis added).

Contrary to McLin's argument, it is clear that the trial court must first make a finding of credibility and that finding is afforded great weight by the appellate court. These standards, as set forth in the opinion below, are not in direct and express conflict with Lee or Light. The cases cited to by McLin do not expressly and directly conflict with the opinion below because they deal with an entirely different claim than that involved in the case sub judice. Accordingly, based on the four corners of the subject opinion, McLin has failed to show the existence of a direct and express conflict with Lee or Light.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the Third District's opinion does not directly and expressly conflict with Lee or Light. Thus, the State

respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

BILL McCOLLUM
Attorney General

LINDA S. KATZ
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Ave., Suite 650
Miami, Florida 33131
(305) 377-5441

RICHARD L. POLIN
Florida Bar No. 0230987
Criminal Appeals Bureau Chief, Miami

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to Charles G. White, Esq. 1031 Ives Dairy Road, #228, Miami, Florida 33179, on this ____ day of July, 2007.

LINDA S. KATZ
Assistant Attorney General

CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to the Rule 9.210(a)(2), Fla. R. App. P. regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

LINDA S. KATZ
Assistant Attorney General

