

IN THE SUPREME COURT OF FLORIDA

RYAN O'CONNOR,

Petitioner,

v.

Case No. SC08-1412

DEAN C. McCAUSLIN,

Respondent.

**ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA**

RESPONDENT'S JURISDICTIONAL BRIEF

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OTHER AUTHORITIES

Art. V, § 3(b)(3) Fla. Const.2

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Fla. R. App. P. 9.120 1977 Committee Note4

STATEMENT OF THE CASE AND FACTS

With two exceptions, Mr. McCauslin accepts the Mr. O’Conner’s statement of the case. First, Mr. O’Conner states that the Fifth District’s “majority conducted its own analysis of the three prongs of the test set forth in *De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995). (Petitioner’s Jurisdictional Brief at 2.) This statement argumentatively and incorrectly suggests that the majority below disregarded the trial court’s analysis of the *De La Rosa* factors. A fair reading of the majority’s opinion reveals that it clearly considered and addressed each of the trial court’s findings and reversed because the key finding on which the trial court relied – that Mr. O’Conner had used peremptory challenges against venire persons who had been injured in accidents – was erroneous. Mr. O’Conner concedes that this finding by the trial court was “mistaken.” (*Id.*)

Second, Mr. O’Conner states in a footnote that the district court failed to report certain “additional findings by the trial court as well as relevant facts in the record.” (*Id.* at 2 n.1.) Because the jurisdictional issue is based exclusively on the four corners of the district court’s opinion, this statement – even if true – is blatantly improper and should be disregarded. Moreover, Mr. McCauslin strenuously disagrees with the veracity of this statement.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction because there is no express and direct conflict. The district court's opinion does not conflict with this Court's precedents regarding the abuse of discretion standard because the district court expressly recognized that this was the applicable standard. More importantly, the district court only rejected one finding of fact by the trial court, and Mr. O'Conner concedes that this finding was mistaken.

Nor does the district court's opinion conflict with this Court's precedents regarding the materiality of a juror's failure to disclose prior litigation history. While the jurors in this case did not disclose prior injuries, the district court noted that there did not appear to have been any prior litigation involving those injuries.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). As argued below, this Court lacks jurisdiction because there is no conflict.

ARGUMENT

The district court's opinion does not directly conflict with any opinion of this Court. Mr. O'Conner appears to assert two purported conflicts: (1) conflict

with this Court's precedents that under the abuse of discretion standard, appellate courts should defer to trial court's with regard to factual matters, and (2) conflict with this Court's precedents that a juror's concealment of prior litigation history can be material for purposes of the test for granting a new trial.

With regard to the standard of review, the district court expressly recognized that the abuse of discretion standard applied. (Petitioner's Appendix at 4.) The only factual finding that the district court rejected was the trial court's finding that the non-disclosure was material because Mr. O'Conner had stricken jurors who had disclosed prior injuries.¹ The district court expressly concluded that the trial court had "clearly relied" on this erroneous finding in concluding that the jurors' concealment was material under the test for granting a new trial based on juror misconduct as set forth in *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995). Because Mr. O'Conner concedes that the trial court's finding was mistaken, there can be no conflict. None of this Court's opinions cited by Mr. O'Conner require an appellate court to defer to a trial court's discretionary decision that is based on an erroneous finding of fact.

There is also no conflict with regard to the district court's conclusion that the jurors' failure to disclose their prior injuries is not per se material. The two

¹ While the district court noted that it was a "close question" and "doubtful" that the other two prongs of the *De La Rosa* test were met in this case (Petitioner's Appendix at 9, 11), it did not conclude as a matter of law that they were not met.

decision on which Mr. O’Conner relies – *De La Rosa* and *Roberts v. Tejada*, 814 So. 2d 334 (Fla. 2002) – involved failures to disclose prior litigation. The district court noted, in contrast, that there did not appear to be any prior litigation arising from the undisclosed injuries in this case. Moreover, in neither *De La Rosa* nor *Roberts* did this Court suggest that a failure to disclose prior lawsuits will always entitle the losing party to a new trial.

Finally, Mr. O’Conner’s repeated statements that the district court’s opinion failed to address matters in the record supporting the trial court’s ruling (Petitioner’s Jurisdictional Brief at 2 n.1, 8 n.2) are blatantly improper at this stage (and are disputed by Mr. McCauslin). *See* Fla. R. App. P. 9.120(d) 1977 Committee Note (“It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue.”); *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986) (“This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions.”).

CONCLUSION

This Court does not have jurisdiction and should dismiss this proceeding.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **Elizabeth C. Wheeler, Esq.**, P.O. Box 2266, Orlando, Florida 32802-2266, attorney for Petitioner Ryan O’Conner, by U.S. mail this 22d day of August, 2008.

Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief uses Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Attorney