

IN THE SUPREME COURT OF FLORIDA

ROBERT M. DAY,

Petitioner,

v.

CASE NO. SC08-807

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

BILL McCOLLUM
ATTORNEY GENERAL

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL
Florida Bar #304565
444 Seabreeze Boulevard
Daytona Beach, FL 32118
FAX (386) 238-4997
TEL (386) 238-4990

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

This court should decline to accept jurisdiction in this case. The decision of the Fifth District Court of Appeal does not expressly and directly conflict with a decision of this Court or any other Florida court. Petitioner does not cite any applicable Florida case as a basis for conflict jurisdiction. This Court must therefore decline review.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT
COURT OF APPEAL DOES NOT EXPRESSLY AND
DIRECTLY CONFLICT WITH A DECISION OF
THIS COURT OR ANY OTHER FLORIDA COURT.

This Court has jurisdiction under Article V, Section (3)(b)(3) of the Florida Constitution only where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The "four corners" of the opinion below reflects that the district court found "no merit to any of the issues raised on appeal, except one. We agree the statute of limitations...bars prosecution of the misdemeanor offenses." (See Exhibit A, page one) Petitioner is seeking discretionary appellate review of the two felony grand theft convictions based on his claim of "cumulative error." He argues, in essence, that if the statute of limitations barred prosecution of all misdemeanor counts, then the grand theft counts must fall due to "cumulative error." This is not the law. Nor does the decision below contain a "conflict" within its "four corners."

Nevertheless, Petitioner maintains that his claim of cumulative error should prevail. However, he cites no case which holds that cumulative error can form the basis of conflict jurisdiction. Moreover, he does not even allege that he raised a claim of cumulative error on appeal. Respondent represents that the initial brief below contained six claims, none of which raised the issue of cumulative error. Petitioner

cannot now claim for the first time that cumulative error below created a conflict in Florida precedent.

Petitioner cites only one alleged conflict case to support his position. In Bell v. State, 965 So.2d 48 (Fla. 2007) this court dealt with the appeal of a postconviction claim in a death case. However, Bell was not seeking discretionary review. His claim of cumulative error was not the basis of his brief on jurisdiction and this Court did not review Bell based upon a conflict in "cumulative error" law. There is no direct and express conflict in this case. Therefore, the denial of Petitioner's "cumulative error" claim is not in direct and express conflict with any other case having this specific set of facts.

Petitioner further claims that because all but two of his original claims had "obvious, facial merit" (see initial brief on jurisdiction at page 5) this "Court is not bound to affirm the lower court's determination that there is no cumulative error." (Id.) This argument, however, ignores the fact that the two remaining claims were not considered by the lower court under a cumulative or harmless error analysis.

Finally, it should be noted that the alleged "errors" below were not typical. There was ample evidence that Appellant committed the misdemeanor crimes; he was convicted of the offenses but the convictions were dismissed because of a technical defect which would not have been apparent to the jury. The statute of limitations was violated. This is a legal issue. This genre of error did not "infect" the entire trial nor did it deprive Petitioner of a fair trial. Plus, the statute of limitations violation was only one error and the ruling below did not create a real or imagined conflict.

This Court, in Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983), initially accepted jurisdiction but then discharged jurisdiction because the case was distinguishable on its facts from those cited as being in conflict with it. Similarly, in Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980) this Court quoted from its earlier decision in Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed...**It was never intended that the district courts of appeal should be intermediate courts...**To fail to recognize that these are courts primarily of **final appellate jurisdiction** and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

(emphasis supplied).

Given the fact that the Fifth District Court is a court of final appellate jurisdiction and given the very limited and restricted bases for this Court's exercise of its discretionary jurisdiction based upon conflict, it cannot be said that Petitioner has established any good cause for the exercise of that jurisdiction. There is simply no express or even implied conflict.

CONCLUSION

Based on the argument and authorities presented herein, Respondent requests this Honorable Court to decline jurisdiction in this cause.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL
Fla. Bar #304565, and

WESLEY HEIDT
Assistant Attorney General
FL Bar No. 773026
444 Seabreeze Blvd.5thFloor
Daytona Beach, FL 32118
FAX: (386) 238-4997
TEL: (386) 238-4990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's brief on jurisdiction in case number SC08-807 has been furnished U.S. Mail to Harper and Harper, counsel for Petitioner, 325 West Park Avenue, Tallahassee, FL 32301-1413 this _____ day of May, 2008.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL