

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1850

LOWER TRIBUNAL NO. DCA: 3D08-942

**TRACEY WENDT,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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

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**BRIEF OF RESPONDENT ON JURISDICTION**

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BILL McCOLLUM  
Attorney General

RICHARD L. POLIN  
Criminal Appeals, Bureau Chief  
Florida Bar Number 230987

NICHOLAS MERLIN  
Assistant Attorney General  
Florida Bar Number 0029236  
Criminal Appeals Unit  
444 Brickell Avenue  
Miami, Florida 33131  
(305) 377-5441

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## STATEMENT OF THE CASE AND FACTS

Petitioner appealed the trial court's denial of her Florida Rule of Criminal Procedure 3.170(l) motion to withdraw plea and motion to appoint conflict-free counsel. The pertinent facts as found by the district court are as follows:

On November 27, 2007, Wendt, who was represented by Assistant Public Defender Matthew Matteliano, pled guilty to driving under the influence ("DUI") and driving while license suspended ("DWLS") in exchange for a sentence of thirty-six months of drug offender probation, credit for the time she served in the county jail, and other conditions.

Less than two months later, an affidavit was filed alleging that Wendt violated her probation by testing positive for cocaine. Wendt, who was again represented by Matteliano, admitted to the violation, and was sentenced to twenty-four months of drug offender community control followed by twenty-four months of drug offender probation, with the special condition that she serve 364 days in the county jail and complete the jail drug treatment program, with early termination of her jail sentence upon completion of the jail drug treatment program.

Several weeks later, Matteliano filed two motions in Wendt's behalf: (1) a timely motion to withdraw Wendt's plea under Florida Rule of Criminal Procedure 3.170(l), wherein Matteliano alleged that Wendt's admission to violating her probation was not knowingly, intelligently, and voluntarily made because she was under the erroneous impression that she would not receive a sentence in excess of the sentence she had received under the original plea agreement; and (2) a motion to appoint conflict-free counsel to assist her in litigating her motion to withdraw her plea. Following a non-evidentiary hearing, the trial court denied both motions.

*Wendt v. State*, 34 Fla. L. Weekly D1803, 2009 WL 2762723 (Fla. 3d DCA Sept. 2, 2009) ("*Wendt 2009*" at \*1).

On appeal, the district court noted:

[W]here a defendant is represented by counsel and the defendant's motion to withdraw his plea is not based upon a claim of coercion, misrepresentation, or another ground creating a conflict between him and his attorney, then new counsel need not be appointed because the defendant is already being represented by conflict-free counsel. *See Sheppard v. State*, No. SC08-1452, \*10 (Fla. Aug. 27, 2009) (holding that "[i]f it appears ... that an adversarial relationship between counsel and the defendant has arisen and the defendant's allegations are not conclusively refuted by the record, the court should either permit counsel to withdraw or discharge counsel and appoint conflict-free counsel to represent the defendant") (footnote omitted); *Gonzalez-Castro v. State*, 34 Fla. L. Weekly D1385, D1385 (Fla. 3d DCA July 8, 2009) ("Because the defendant's motion to withdraw his plea fails to allege any conflict between him and his attorney, we find that the trial court correctly denied the defendant's motion to appoint conflict-free counsel."); *Williams v. State*, 919 So. 2d 645, 646 (Fla. 4th DCA 2006) (finding that where the coercion alleged is legally insufficient or conclusively refuted by the record, there is no need to hold an evidentiary hearing or appoint conflict-free counsel). *See also Cunningham v. State*, 677 So. 2d 929, 930-31 (Fla. 4th DCA 1996) (declining to establish a per se rule requiring a trial court to appoint new counsel to argue the defendant's motion to withdraw his plea upon the mere filing of a motion to withdraw plea and a motion to discharge counsel; and affirming the trial court's denial of these motions where there was no claim of coercion and the plea colloquy conclusively refuted the allegations).

*Id.* at \*2. The district court found that Petitioner had not alleged any coercion or misrepresentation by her counsel or assert that her counsel was the source of her "misunderstanding" or erroneous "impression." *Id.* at \*3. Therefore, the trial court properly denied her motion to appoint conflict-free counsel. *Id.* After reviewing the record and relevant documents, the district court concluded:

In light of this record, which includes the original written plea

agreement, probation order, Department of Corrections report, and transcript of the probation violation proceedings, we conclude that the record conclusively refutes Wendt's claim that she was under the "misunderstanding" and/or "erroneous impression" that if she admitted to the violation of probation, the trial court would not impose a sentence longer in time than the sentence she had originally received under the plea agreement (probation) and that she would not have admitted to the violation absent the "misunderstanding" and/or "erroneous impression." Accordingly, we affirm the trial court's summary denial of Wendt's motion to withdraw her plea. *See Wallace*,<sup>1</sup> 939 So. 2d at 1126 (holding that when the allegations set forth in a motion to withdraw a plea are "conclusively refuted by the record, there is no need to hold an evidentiary hearing"); *see also Gonzalez-Castro*, 34 Fla. L. Weekly D1386.

*Id.* at \*4. Petitioner now seeks discretionary review of the Third District Court of Appeal's decision. The State has filed this brief in response.

### **SUMMARY OF ARGUMENT**

The lower court's opinion in *Wendt* does not conflict with this Court's recent decision in *Sheppard*. Further, there is no express and direct conflict between the district courts of appeal on the issue that she raises.

### **ARGUMENT**

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISIONS OF THIS COURT OR ANY OF THE DISTRICT COURTS OF APPEAL.

As a general rule, conflict jurisdiction exists when a decision of a court of appeal *expressly and directly conflicts* with another court of appeal "on the same

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<sup>1</sup> *Wallace v. State*, 939 So. 2d 1123 (Fla. 3d DCA 2006).

question of law.” Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv) (emphasis added). In this case, however, there was no such conflict, and this Court should decline to exercise its discretionary jurisdiction for the reasons that follow.

The critical fact in the instant case, which does not exist in any of the cases relied upon by Petitioner is the fact that in the instant case, there was no allegation that defense counsel misled her, coerced her, or acted in any manner that was deficient; instead, Petitioner only alleged that she misunderstood something, which is unlike all of the cases except for *Rios v. State*, 958 So. 2d 1080, 1081 (Fla. 1st DCA 2007); that case, in turn, was factually distinguishable from the instant case because the defendant in *Rios* alleged that she was not taking her medication for a shrinking brain tumor and that English was her second language.

Nonetheless, Petitioner alleges that there is conflict. First, she refers to this Court’s decision in *Sheppard*, where a represented defendant filed a pro se motion to withdraw plea based on allegations of misadvice. In that case, the defendant alleged that *counsel refused to allow him to accept the State’s plea offer and misled him about the sentence* he would receive. *Id.* at \*2 (emphasis added). There, unlike the instant case, the issue was whether a trial court must strike as a nullity a defendant’s pro se motion to withdraw his plea pursuant to Rule 3.170(I) where the defendant is represented by counsel and the motion does not include a clear request to discharge counsel but contains allegations that give rise to an

adversarial relationship, such as allegations that counsel misadvised the defendant, made affirmative misrepresentations regarding the terms of the plea, or coerced him into taking the plea. *Id.* at \*1.

The *Sheppard* Court reaffirmed the principle that there is no constitutional right for a defendant to simultaneously represent himself and be represented by counsel at the trial court level. *See Logan v. State*, 846 So. 2d 472 (Fla. 2003); *Johnson v. State*, 974 So. 2d 363 (Fla. 2008). However, the *Sheppard* Court clarified that *Logan* and *Johnson* were not intended to enunciate an unbending rule to require the striking of pleadings in the trial court even where the defendant makes specific allegations that would give rise to a clear adversarial relationship with his counsel, such as misadvice, affirmative misrepresentations, or coercion that led to the entry of the plea. *Sheppard*, at \*6. After analyzing the relevant facts and case law, this Court explained:

In these narrow circumstances, the trial court should not strike the pleading as a nullity even though the defendant did not also specifically include the phrase, “I request to discharge my counsel.” Rather, the trial court should hold a limited hearing at which the defendant, defense counsel, and the State are present. If it appears to the trial court that an adversarial relationship between counsel and the defendant has arisen and the defendant’s allegations are not conclusively refuted by the record, the court should either permit counsel to withdraw or discharge counsel and appoint conflict-free counsel to represent the defendant.

*Id.* at \*10 (footnote omitted).

Here, unlike *Sheppard*, Petitioner did not file a pro se motion to withdraw plea while represented by an attorney and did not allege that counsel misled her.

Rather, as noted by the Third District Court of Appeal:

Wendt was represented by counsel, and the motion to withdraw her plea was based upon her allegation that “she was under the impression that she would not receive a sentence longer in time than the sentence she originally received pursuant to a negotiated plea” and “if not for this misunderstanding, she would not have entered her admission to violation of [her] probation.” Wendt does not allege any coercion or misrepresentation by her counsel or assert that her counsel was the source of her “misunderstanding” or erroneous “impression.” Because Wendt’s motions fail to allege a facially valid claim reflecting a conflict with her counsel, we conclude that the trial court properly denied her motion to appoint conflict-free counsel.

*Wendt 2009* at \*3. Since the Petitioner did not argue that her misunderstanding was the result of counsel’s misadvice, and since Petitioner did not allege that counsel threatened or coerced her, the record did not establish an adversarial relationship, and therefore, the decision in *Wendt* did not conflict with this Court’s precedent.

Petitioner also cites to the Fourth District Court of Appeal’s decision in *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). In *Nelson*, the defendant was charged and convicted by a jury of robbery. Following his judgment and sentence, the defendant filed a Rule 3.850 motion alleging that although he had court appointed counsel at the time of arraignment, he only saw counsel on one occasion. The motion further alleged that appointed counsel was a personal friend of the robbery victim. Appointed counsel allegedly suggested that his client plead guilty.

In addition, after the defendant refused to plead guilty, the defendant asked the trial judge, prior to the commencement of the trial, to dismiss counsel. The trial judge complied with the request to dismiss the lawyer, but refused the defendant's request to appoint a successor. As a consequence, he was required to stand trial without the assistance of counsel. Nevertheless, the trial court denied the motion.

On appeal, the *Nelson* Court reversed, setting forth a procedure for courts to follow for protecting an indigent defendant's Sixth Amendment right to counsel in a criminal prosecution where, *before the commencement of trial*, the defendant moves to discharge appointed counsel. *Id.* at 258 (emphasis added). The *Nelson* Court explained, in pertinent part, that if, prior to trial, incompetency of counsel is alleged by the defendant, then the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. *Id.* at 258-59.

In the instant case, though, Petitioner did not proceed to trial and instead pled guilty. Although Petitioner's Rule 3.170(l) motion alleged that she was under a misimpression about her sentence, the opinion in *Wendt* does not provide any indication that defense counsel was ineffective prior to entering into the plea, nor was there any allegation that counsel misled or misadvised her or that her mistaken impression was in any way attributable to the actions or inactions of counsel, and

given those circumstances, there was no express and direct conflict with *Nelson*.

Finally, Petitioner argues that conflict-free counsel is warranted because defense counsel failed to represent her interests and lacked loyalty. *See Grainger v. State*, 906 So. 2d 380 (Fla. 2d DCA 2005); *Garcia v. State*, 846 So. 2d 660 (Fla. 2d DCA 2003); *Rios*, 958 So. 2d at 1080; and *Golden v. State*, 987 So. 2d 1279 (Fla. 2d DCA 2008). However, all of these cases are distinguishable. In *Grainger*, a defendant, while represented by counsel, filed a pro se motion to withdraw plea in the trial court. A hearing was held, during which the defendant's attorney testified that his client had "buyer's remorse." *Id.* at 381. The trial court denied the motion. Although the Second District found that the attorney had demonstrated disloyalty to his client, the trial court should never have ruled on the merits of the motion; thus, the case was remanded with instructions to strike the motion. *Id.* at 383.

In *Rios*, a defendant alleged she had not been taking her required medication and did not properly understand English; thus, she was unaware of what was being said in court. *Id.* at 1081. A hearing was held, during which counsel explained that he could not in good faith assist his client in withdrawing her plea. Counsel also indicated that he did not believe that his client's medical condition or language skills interfered with her ability to understand the proceedings and plea agreement. The court denied the motion but told counsel that defendant could file a pro se pleading to pursue the claim. On appeal, the First District found that trial counsel

argued against his client's interests, and once it became clear that they had adverse positions, the trial court should have appointed conflict-free counsel. *Id.*

In *Garcia*, a defendant wrote a letter to the trial court indicating that his court-appointed attorney misled him. *Id.* at 660-61. The trial court treated the letter as a motion to withdraw plea, and an informal hearing was held on the motion. The defendant was not present, and the attorney testified that he could not conceive of how he misled his client. The trial court denied the motion, and the Second District reversed, finding that defense counsel's testimony at the hearing demonstrated an adversarial position. *Id.* at 661. Similarly, in *Golden*, a defendant testified that his counsel misinformed him that his family wished him to accept a plea offer. While the defendant was explaining his pre-plea discussion with counsel to the court, counsel interjected and said that she disputed the allegations. *Id.* at 1280. The Second District held that the trial court should have appointed counsel when it became apparent that the defendant and defense counsel had adversarial positions regarding what happened when counsel advised him about the plea offer. As there was no adversarial relationship in the instant case, there was no express and direct.

## CONCLUSION

Accordingly, Petitioner has failed to assert a basis to invoke this Court's jurisdiction as there is no express and direct conflict between the instant case and the decisions she has cited in her brief. Fla. R. App. P. 9.030(a)(2)(A)(iv).

WHEREFORE, the State respectfully requests this Court to decline discretionary jurisdiction.

Respectfully Submitted,

BILL McCOLLUM  
Attorney General  
Tallahassee, Florida

and

\_\_\_\_\_  
RICHARD L. POLIN  
Miami Bureau Chief  
Florida Bar Number 230987

\_\_\_\_\_  
NICHOLAS MERLIN  
Florida Bar Number 0029236  
Assistant Attorney General  
Office of the Attorney General  
Department of Legal Affairs  
444 Brickell Avenue, Suite 650  
Miami, Florida 33131  
(305) 377-5441

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed to Shannon McKenna, Assistant Public Defender, the Office of the Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, this \_\_\_\_ day of October 2009.

\_\_\_\_\_  
NICHOLAS MERLIN  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS**

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

\_\_\_\_\_  
NICHOLAS MERLIN  
Assistant Attorney General