

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DAVID ERIC HOBBS,

Petitioner,

v.

Case No. SC08-615
5th DCA No. 5D07-1199

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The only facts relevant to this Court in determining whether to accept jurisdiction are those contained within the opinion of the district court.¹ Respondent offers the following as a complete statement of the case and facts.

The Fifth District Court of Appeal's opinion in State v. Hobbs, 947 So. 2d 1119 (Fla. 5th DCA 2008), stated:

David Eric Hobbs, Appellee, stands accused of sexual activity with a child by a person in a familial relationship and lewd or lascivious battery. The sole issue on appeal concerns the admissibility of Appellee's confession pursuant to section 92.565, Florida Statutes (2007), which eliminates the *corpus delicti* precondition for introduction of admissions and confessions in sexual abuse cases when the state is otherwise unable to prove the crime. Based on the First District's decision in Kelly v. State, 946 So.2d 591 (Fla. 1st DCA 2006), the trial court ruled that Appellee's confession was inadmissible because the State's inability to prove the crime was due to the victim's lack of cooperation rather than her incapacity. The State acknowledges that the trial court correctly applied Kelly, but contends here,

¹Reaves v. State, 485 So. 2d 829, 830, n. 3 (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. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.")

as it did below, that Kelly's narrow construction of the statute is erroneous. Based on the unambiguous text of the statute, we agree and certify conflict with Kelly. Accordingly, we reverse and remand this cause for further proceedings.

Several days after the victim accused Appellee of improper sexual activity and gave a sworn statement to police, she recanted, claiming that she had fabricated the charges. Prior to the recantation, however, police had interviewed Appellee, and he provided a recorded confession. As a result of the recantation, the State filed a pretrial motion seeking to admit Appellee's confession without first proving each element of the charged offenses. The State's motion was based on [section 92.565\(2\), Florida Statutes](#)[.]

Despite the pervasive language of the statute, Appellee contends that the statute is only applicable when the state is unable to prove a crime because the victim is incapacitated or under the age of twelve, which the State concedes is not the case here. Appellee's position is grounded in the First District's decision in Kelly, which, on indistinguishable facts, held that section 92.565 only applies when the state is unable to prove a crime because of some disability on the part of the victim. Kelly, 946 So.2d at 593.

We conclude, therefore, that where a victim repudiates charges and declines to cooperate, and other evidence is not available to prove the *corpus delicti*, the burden of the state can be met even though the victim is not incapacitated. See [Hernandez v. State](#), 946 So.2d 1270 (Fla. 2d DCA 2007)(statute permits use of trustworthy

confession when state unable to locate victim). Because the trial court was bound by [Kelly](#) and based its ruling entirely on that precedent, it did not fully address the issues and make the specific findings required by the statute. On remand, the trial court shall conduct a new hearing, as contemplated by the statute, and make specific findings as appropriate.

We certify that our holding today conflicts with the First District's decision in [Kelly](#).

Id. at 1120-1121.

Petitioner filed a notice to invoke the discretionary jurisdiction of this Court. Respondent files its brief on jurisdiction in response to Petitioner's jurisdictional brief.

SUMMARY OF THE ARGUMENT

The Court is limited to the facts contained within the four corners of the decision in determining whether an express and direct conflict exists. The Fifth District Court certified conflict; however, this Court can decline to accept jurisdiction in the instant case.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL CERTIFIED
CONFLICT WITH KELLY V. STATE; HOWEVER, THIS
COURT MAY DECLINE JURISDICTION.

Petitioner seeks discretionary review with this Honorable Court under Article V, Sections 3(b)(3)&(4) of the Florida Constitution. See also Fla. R. App. P. 9.030(a)(2)(A)(iv)&(vi). Article V, Section 3(b)(3) provides that the Florida Supreme Court "**may**" review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." (Emphasis added). Article V, Section 3(b)(4), provides that the Florida Supreme Court "**may**" review a district court of appeal decision that is "certified by it to be in direct conflict with a decision of another district court of appeal." (Emphasis added). While the Fifth District Court of Appeal certified conflict in the instant case with the First District Court of Appeal's decision in Kelly v. State, this Court can decline to accept jurisdiction.

Finally, in Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

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.

Accordingly, while the Fifth District Court of Appeal certified conflict with Kelly v. State, this Court can decline to accept jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully notes that this Honorable Court can decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Respondent has been furnished via hand delivery to counsel for Petitioner, Brynn Newton, Assistant Public Defender, at 444 Seabreeze Blvd., Suite 210, Daytona Beach, FL 32118, this 24th day of April, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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