IN THE SUPREME COURT OF FLORIDA

KIMBERLY BRABSON, III,

PETITIONER,

v.

STATE OF FLORIDA,

RESPONDENT.

CASE NO.: SC09-136
DCA NO: 2D07-5619

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

BILL McCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief–Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

ELBA C. MARTIN-SCHOMAKER
Assistant Attorney General
Florida Bar No. 513342
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal in State v. Brabson, 2008 WL 5352873 (Fla. App. 2nd Dist. December 24, 2008). (See Appendix).

SUMMARY OF THE ARGUMENT

Petitioner fails to establish conflict jurisdiction between the Second District's opinion in Brabson, supra, and the Fourth District's opinion in Lockwood. Moreover, the instant opinion does not "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 well-reasoned, exhaustive decision of the Second District Court of Appeal presents a case in which this Court should respect the role of the District Courts of Appeal as the courts of last resort in Florida. Therefore, this Court should decline to exercise its discretionary jurisdiction where Petitioner has failed to identify and demonstrate any credible basis for this Court to revisit the Second District's opinion.

ARGUMENT

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN STATE V. BRABSON, 2008 WL 5352873 (FLA. APP. 2 DIST. DECEMBER 24, 2008), EXPRESSLY AND DIRECTLY CONFLICTS WITH LOCKWOOD V. STATE, 588 SO.2D 57 (4TH DCA 1991)?

Petitioner attempts to invoke this Court's jurisdiction based on express and direct conflict. This Court has authority as the highest court of the State to resolve legal conflicts created by the district courts of appeal. Article V, §3(b)(3) of the Florida Constitution authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or with a decision of the Florida Supreme Court. This Court has held that review under Article V, §3(b)(3), Florida Constitution, requiring express and direct conflict, is unavailable "where the opinion below establishes no point of law contrary to a decision of th[e Supreme] Court [of Florida] or other district court." The Florida Bar v. B.J.F. 530 So.2d 286, 289 (Fla. 1988). The issue of the Court's jurisdiction is a "threshold matter that must be addressed" before the Court can reach the merits of the issue. In Re Holder, 945 So.2d 1130, 1134 Fla. 2006).

The rationale for limiting this Court's jurisdiction is the

recognition that district courts "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." Jenkins v. State, 385 So.2d 1356, 1358 (Fla. 1980).

As this Court explained in B.J.F., the state constitution creates two separate concepts regarding this Court's discretionary review. 530 So. 2d at 288. The first concept is the broad general grant of subject-matter jurisdiction. The second, more limited concept, is a constitutional command as to how this Court may exercise its discretion in accepting jurisdiction. Id. at 288.

Furthermore, in order for this Court to exercise its discretionary jurisdiction based on *express or direct* conflict, the conflict must appear on the face of the allegedly conflicting opinions. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Additionally, the only facts relevant to the issue of whether there is direct and express conflict are the facts contained within the four corners of the majority opinion of the allegedly conflicting cases. Id. As this Court stated in Reaves:

> The only facts relevant to our decision to accept or reject such petitions [based on alleged conflict] 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.

Id. at 830, n3.

I. The Brabson opinion does not expressly and directly conflict with Lockwood.

Respondent submits that Lockwood v. State, 588 So.2d 57 (Fla. 4th DCA 1991) is factually and procedurally distinguishable from the instant matter and, therefore, this is no express and direct conflict. In Lockwood, the Fourth District found that a video tape showing a sixteen year old girl undressing, showering, toweling herself dry, and performing other acts of feminine hygiene and donning clothing did not meet definition of sexual conduct as defined by Section 827.071(1)(g), Florida Statutes (1989) and, therefore, a motion for judgment of acquittal should have been granted. Id. at 57-58.

> The presentation shows, rather, the innocent, normal everyday occurrence of a female child undressing, showering, performing acts of female hygiene and donning her clothes,

> none of which meets any of the detailed sexual acts contained in the statute.

Id. at 58.

However, in this case, unlike in Lockwood, the videotape does not show normal, everyday activities of a female child. The videotape, in this case, shows girls changing into bathing suits after being manipulated into trying on the suits in Appellant's office as opposed to a normal, everyday place at a school such as a locker room. Moreover, the procedural posture of this case is a motion to dismiss, not a motion for judgment of acquittal as in Lockwood.

Importantly, the Second District Court of Appeal distinguished Lockwood from this case in its opinion. The Second District found,

> In *Lockwood* and *Fletcher*, the cameras were apparently placed in static locations and videotaped the nude victims in everyday activities, such as showering or dressing, occurring in bedrooms or bathrooms where such activities normally occur. In the instant case, Brabson placed the camera in his school office. Brabson then lured the girls to his office, where they otherwise would not have been undressing and changing into bathing suits, but for Brabson's cajoling. Furthermore, the victims seem to have been enticed to change in the office with the intent that their nude bodies be visible to the camera and recorded. What we have before us is a clearly orchestrated plan by Brabson

> to videotape unsuspecting underage girls in a place where, but for Brabson's machinations, they would never have undressed.

(Appendix, pg. 11). Therefore, the Second District has sufficiently distinguished Lockwood, and there is no express and direct conflict.

II. The Brabson opinion does not directly and expressly conflict with Fletcher

The Florida Constitution, article V, section 3(b)(3), authorizes this Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of **another district court of appeal** or with a decision of the **Florida Supreme Court**. Fletcher, however, was decided by the Second District Court of Appeal and, therefore, there can be no express and direct conflict with this Court or another district court pursuant to Article V, §3(b)(3), Florida Constitution. Fletcher v. State, 787 So.2d 232 (Fla. 2d DCA 2001). Petitioner's remedy for intra-district conflict would have been a motion for rehearing under Florida Rule of Appellate Procedure 9.330 and 9.331.

In addition, under Rule 9.120(d), Florida Rules of Appellate Procedure, a petitioner's brief is limited solely to the issue of this Court's jurisdiction. However, Petitioner has failed to abide by this singular requirement. While ostensibly

submitting a jurisdictional brief, Petitioner has instead raised various merits arguments taken from his "innocent conduct" claims in the District Court.

In Florida, the District Courts of Appeal are not intended to be just preliminary or "intermediate" appellate courts. See Jenkins, 385 So.2d at 1358, citing, Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958); see also Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure, Committee Notes, 1980 Amendment ("The district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V."); John M. Scheb, Florida's Courts of Appeal: Intermediate Courts Become Final, 13 Stetson L. Rev. 479 (1984). Here, the well reasoned, exhaustive majority opinion presents a case in which this Court should respect the role of the District Court of Appeal as the court of last resort in Florida.

III. The Brabson opinion does not directly and expressly conflict with Schmitt and the Second District did not misread Schmitt.

Petitioner alleges the Second District Court of Appeal misread Schmitt v. State, 590 So.2d 404 (Fla. 1991), in its opinion. However, even if the Court misread Schmitt, which the Respondent disputes, this does not establish direct and express conflict as contemplated by Article V, §3(b)(3) of the Florida

Constitution. See also B.J.F., 530 So.2d at 289. And, furthermore, the Second District did not misread Schmitt. The Second District's opinion is consistent with Schmitt holding:

> While it is conceivable that one might view the allegations in the present affidavit as depicting simple nudity, we believe the magistrate had a substantial basis for concluding otherwise. The affidavit's factual allegations indicated that Schmitt did not treat the nudity of himself, his daughter, and others in the offhand, natural manner that might be expected if the conduct were purely innocent-for example, if they were nudists. Rather, the affidavit shows he made nudity a central and almost obsessive object of his attention. Thus, the magistrate reasonably could have believed that Schmitt's conduct toward his daughter included the "lewdness" element required by the statute. While nudity alone would not have sufficed, this overall focus of Schmitt's conduct tended to show a lewd intent and thus created a substantial basis for believing that the search would fairly probably yield evidence of a violation of section 827.071.

Schmitt, 590 So.2d at 411. Similarly, the Second District in this case found like Schmitt:

> In the instant case, as demonstrated by the defendant's videotapes, nudity and female genitalia were the focus of Brabson's filming. The second portion of the videotape shows that Brabson positioned the camera at waist-level and placed the bathing suits in relation to the camera in such a way that the victims' genitalia became the focal point of the recording.

(Appendix, pg. 9-10). Petitioner fails to establish conflict.

IV. The Brabson opinion does not directly and expressly conflict with Dost pursuant to Article V, §3(b)(3) of the Florida Constitution.

As argued above, the opinion is this case must expressly and directly conflict with a decision of another district court or with a decision of this Court. See Article V, §3(b)(3), Florida Constitution. As such Petitioner has failed to demonstrate express and direct conflict with United States v. Dost, 636 F.Supp. 828 (S.D. Cal. 1986).

Also, Petitioner relies upon a case which is not cited in the instant opinion, United States v. Amiraut, 173 F.3d 28 (1st Cir. 1999) and again attempts to argue the merits. See Reaves, 485 So. 2d at 829; See also Persaud v. State, 835 So.2d 529 (Fla. 2003); Rule 9.120(d), Florida Rules of Appellate Procedure.

In sum, Petitioner has failed to demonstrate that the Brabson opinion by the Second District Court of Appeal is in direct and express conflict with Lockwood. Additionally, the Second District did not misread Schmitt. Further, the Brabson opinion is not in direct and express conflict with Fletcher and Dost because they are not opinions from another district court or this Court.

CONCLUSION

Petitioner respectfully requests that this Honorable Court deny jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to James E. Felman, Esq., P.O. Box 3396, Tampa, FL 33601 on this 18th of February, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
BILL McCOLLUM
ATTORNEY GENERAL

_____
ROBERT J. KRAUSS
Chief—Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

_____
ELBA CARIDAD MARTIN-SCHOMAKER
Assistant Attorney General
Florida Bar No. 513342
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT