

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1347
DCA CASE NO. 3D10-880

FRANTZY JEAN-MARIE,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

BRIEF OF RESPONDENT ON JURISDICTION

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief, Criminal Appeals
Florida Bar No. 0230987

MICHAEL C. GREENBERG
Assistant Attorney General
Florida Bar No. 0487678
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (305) 377-5655

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STATEMENT OF THE CASE AND FACTS

On April 1, 2010, Petitioner filed a petition with the Third District Court of Appeal in 3D10-880 claiming that appellate counsel in his direct appeal in 3D04-2570 regarding his conviction for armed burglary and carrying a concealed weapon, was ineffective for failing to include the claim that the trial court erred inter alia in giving a instruction containing the “and/or” conjunction regarding the offense of resisting without violence:

Claim 3(b): Petitioner alleges ineffective assistance of appellate counsel for failing to raise on direct appeal, trial court erred in the use of and/or conjunctive when instructing the jury on an essential element of resisting without violence.

(App. A: 19).

On May 19, 2010, the court denied the petition and stated the following in its opinion finding the issue meritless:

In its opinion the Third District Court of Appeal found the issue meritless:

The defendant next contends that his appellate counsel was ineffective for failing to raise issues regarding numerous jury instructions that the defendant claims were improper.FN1 The defendant has not met his burden of showing ineffective assistance of appellate counsel for not raising the claims of instructional error on direct appeal. See Rutherford, 774 So.2d at 637. Jury instructions are subject to the contemporaneous objection rule and, absent an objection at trial, can be raised on direct appeal only if fundamental error occurred. The defendant has not asserted that trial counsel objected to any of these instructions. The defendant has not shown that any of the alleged instructional errors was fundamental error that could

have been raised on appeal even though not preserved at trial. See *Israel v. State*, 985 So.2d 510 (Fla.2008). Therefore, appellate counsel cannot be deemed ineffective for not raising these jury instruction issues on appeal. The defendant's claims of error on the jury instruction issues are denied.

FN1. The defendant argues error in the failure to give or in the allegedly erroneous giving of jury instructions on the following issues: the definition of the execution of a legal duty; resisting an offense without violence as an underlying offense of burglary; proof of intent for burglary; the use of the conjunction “and” and “or” in arguing resisting arrest without violence and carrying a concealed firearm; the use of the conjunctions “and” and “or” in referring to the names of the police officers; and the reference to being armed in the attempt to commit the offense of flight after the commission of the crime.

Even if the claims had been preserved for appellate review, appellate counsel cannot be deemed ineffective for failing to pursue the claims we conclude are meritless.

Jean-Marie v. State, 35 So. 3d 116, 117 -118 (Fla. 3d DCA 2010).

On July 12, 2010, Petitioner filed his jurisdictional brief. In his brief, Petitioner claims that the Third District Court of Appeal’s opinion in 3D10-880 directly and expressly conflicts with the court’s opinion in Comer v. State, 997 So. 2d 440 (Fla. 1st DCA 2008). The state’s response follows.

SUMMARY OF THE ARGUMENT

The decision below does not expressly and directly conflict with the cited opinions of this Court or the other appellate courts of this State since the cited case Comer v. State, 997 So. 2d 440 (Fla. 1st DCA 2008), dealt with the elements of the substantive crime of an assault while the instant case was in regards to the use of a nolle prossed resisting without violence charge to prove the underlying offense of burglary. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY CASE CITED BY PETITIONER SINCE THE DISTRICT COURT'S DECISION DID NOT ADDRESS THE MERITS OF THE CASE.

Petitioner contends the Third District Court of Appeal's opinion in the instant case, Jean-Marie v. State, 35 So. 3d 116 (Fla. 3d DCA 2010), directly and expressly conflicts with: Comer v. State, 997 So.2d 440 (Fla. 1st DCA 2008).

Article V, § 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), provide that this Court's discretionary jurisdiction may be sought to review a decision of a District Court of Appeal which expressly and directly conflicts with a decision of another District Court of Appeal or of this Court on the same question of law. Decisions are considered in express and direct conflict when the conflict appears within the four corners of the majority decision.

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). This Court cannot exercise its discretionary

jurisdiction to review the decision below as it does not conflict with Petitioner's cited case.

The District Court of Appeal in Jean-Marie did not set forth any facts regarding the use of the "and/or" conjunction other than they were meritless in 3D10-880. Absent any facts regarding the use of the "and/or" conjunction, there cannot possibly be any express and direct conflict with other courts. Since there is no basis from the court's opinion to determine whether any conflict exists, this claim should be dismissed.

In Reaves v. State, 485 S.2d 829 (Fla. 1986), this Court noted:

Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Reaves at 830.

This Court cannot exercise its discretionary jurisdiction to review the decision below as it does not conflict with Petitioner's cited case.

The Cited Case Does Not Conflict with the Opinion Below

The cited case does not conflict with the instant case, since the District Court's denial was based upon a finding that even if Petitioner had preserved his claim of ineffective assistance of trial counsel it was meritless.

The Petitioner's claim that his appellate counsel was ineffective for failing to claim in his initial brief that the court erred in allowing the "and/or" conjunction to be given was heard by the District Court of Appeal and denied. Jean-Marie v. State, 35 So. 3d 116 (Fla. 3d DCA 2010).

The instant case does not conflict with Comer. First, in the instant case there was no assault charge where the jury could have convicted Jean-Marie improperly if one victim had felt threatened and the other victim feared violence.

In Comer, the defendant had been convicted of assault and resisting arrest. In the instructions to the jury, the court advised the following:

In instructing the jury on assault, the court advised that findings of guilt could be made if it was found that the defendant intentionally and willfully threatened to do violence to one of the deputies and/or the other, and that this action created in the mind of one deputy and/or the other a well-grounded fear that violence was about to take place. The "and/or" conjunctive was used in similar fashion when the jury was instructed on resisting arrest. These instructions were found to be fundamental error in Miller v. State, 918 So.2d 415 (Fla. 2d DCA 2006) (relying on Tindle v. State, 832 So.2d 966 (Fla. 5th DCA 2002), and James v. State, 706 So.2d 64 (Fla. 5th DCA 1998)).

Comer at 440.

The issue in Comer was in regards to the assault charge and not the resisting arrest charge. The issue in Comer was whether the use of the "and/or" conjunction in the instruction may have led the jury to improperly convict Comer of assault if

his threat to do violence was to only one deputy, but that the other deputy had a fear that violence was about to take place. (See Miller v. State, 918 So. 2d 415 (Fla. 2d DCA 2006)(instruction permitted jury to find defendant guilty if one alleged victim was threatened while the other victim had a well-founded fear of violence).

The instant case does not conflict with Comer. First, in the instant case there is no direct conflict since there was no assault charge where the jury could have convicted Jean-Marie improperly if one victim had felt threatened and the other victim feared violence. Petitioner was convicted of armed burglary and carrying a concealed firearm.

Instead Petitioner is claiming that the “and/or” instruction was improperly given for the resisting without violence charge which may have caused the jury to find that he did obstruct Officer Lang from issuing a traffic ticket, rather than his flight from Officer Smith:

By including Officer J. Lang in the jury instruction for resisting without violence, the jury may have found him guilty of obstructing Officer J. Lang in issuing the driver a traffic ticket, which Jean-Marie attempted to avoid entirely.

(Petitioner’s Jurisdictional Brief at 4).

CONCLUSION

As no conflict exists between the face of the district court's opinion in Jean-Marie and the case cited by Petitioner, Respondent respectfully requests that this Court deny the instant petition for discretionary review.

Respectfully Submitted,

BILL McCOLLUM
Attorney General

RICHARD L. POLIN
Bureau Chief, Criminal Appeals

MICHAEL C. GREENBERG
Assistant Attorney General
Florida Bar Number 0487678
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, Florida 33131
Telephone: (305) 377-5441
Facsimile: (305)377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to Frantzy Jean-Marie, Jail# 070088205, Pretrial Detention Center, 1321 N.W. 13th Street, Miami, FL 33125, this 24th day of August 24, 2010.

MICHAEL C. GREENBERG
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief was written using 14-point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

MICHAEL C. GREENBERG
Assistant Attorney General