

IN THE SUPREME COURT OF FLORIDA

EUGENE LUCAS,
Petitioner,

v.

CASE NO. SC11-1236

STATE OF FLORIDA,
Respondent.

_____/

On Discretionary Review from the First
District Court of Appeal: NON-Certified Conflict

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Case--Lucas seeks review of the First District's decision on direct appeal: Lucas v. State, 34 So.3d 195 (Fla.1st DCA 2010). The decision, which did not certify conflict, was issued May 6, 2010; the mandate issued May 24. By its June 22, 2011 order in case SC10-478, this court effectively accepted Lucas' belated notice to invoke.

Facts from Decision Below--Lucas was convicted for first degree, and attempted first degree, murder. On appeal, the First DCA addressed the issue of whether the trial court abused its discretion by allowing the jury to have a video cassette player during deliberation, so it could view the video tape of Lucas' confession to police.

The videotaped statement was separately admitted into evidence; and, as the opinion noted, not a deposition or out-of-court testimony. It included "admissions of fact and details of the crimes," and was "freely and voluntarily given." (opinion, p.2). It was a confession. (*Id.*) The opinion concluded by holding the trial court did not abuse its discretion, "by allowing the jury to have access to the videotaped confession." (p.3).

SUMMARY OF ARGUMENT

Omitted due to brevity of argument.

ARGUMENT

DOES THIS COURT HAVE JURISDICTION TO REVIEW THE DECISION BELOW, BASED ON NON-CERTIFIED CONFLICT? (Restated).

A. Standard of Review

This court must determine whether the decision below conflicts with any of three cases advanced by Lucas (JB,p.5-6)--a question of law answered *de novo*. Cf. Jacobsen v. Ross Stores, 882 So.2d 431, 432 (Fla.1st DCA 2004)(questions of subject matter jurisdiction are reviewed de novo).

B. No Jurisdiction

To establish conflict, Lucas advances three cases which allegedly concern "structural defects" in a trial: Johnson v. State, 994 So.2d 960, 965 (Fla.2008) (applying harmless error analysis to uphold conviction for felony DUI, when jury convicted for third DUI, but trial court--without valid waiver--found the existence of predicate DUI convictions); Barnes v. State, 970 So.2d 332, 336 (Fla.2007) (concluding the written transcript of the defendant's first trial testimony was not a "thing" which should have been received into evidence after having been read to the jury during the second trial); and Bryant v. State, 656 So.2d 426, 429 (Fla.1995) (concluding the trial court's absence from a read-back of testimony without the defendant's valid waiver constituted reversible error).

Under Art.V,§3(b)(3), Fla.Const., this court:

May review any decision of a district court of appeal that
... expressly and directly conflicts with a decision of
... the supreme court on the same question of law. [e.s.].

The opinion below makes no mention of Johnson or Bryant. Again, Johnson involved the bifurcated procedure by which the defendant was found guilty of felony DUI, something far different from the evidentiary ruling here. Bryant involved the judge's absence during readback of testimony, also far different from the evidentiary ruling here. Not mentioned in the opinion below, and involving significantly different facts and legal issues; neither Johnson nor Bryant establishes conflict.

In contrast, the opinion below expressly distinguished Barnes:

Compare Barnes, 970 So.2d 332 [] (written transcript of defendant's testimony in previous trial not properly allowed in jury room as exhibit for second trial; jury might question defendant's decision not to testify in second trial).

(opinion, p.2). The terse parenthetical note obviates any potential conflict with Barnes.

The object at issue in Barnes was the transcript of the defendant's testimony at a prior trial, not a properly admitted videotape of a confession to police. The transcript object was not a "thing" contemplated by rule 3.400(a)(4)[now 3.400(a)(3)].⁰ See Barnes, 970 So.2d at 336 ("[U]nlike a signed confession, a transcript

⁰ ¹Former 3.400(a)(3) was later deleted. See In re Amendments, 967 So.2d 178, 187 (Fla.2007).

of prior testimony is not generally considered physical evidence in a criminal case." [e.s.]).

Second, because the transcript was the defendant's first-trial testimony, it stood in stark contrast to the defendant's exercise of his right not to testify in the second trial. Here, the "thing" was a videotaped confession, which not only is considered physical evidence, but does not implicate the defendant's right to silence at trial. Under these circumstances, Barnes does not establish conflict.

CONCLUSION

This court lacks jurisdiction to review the decision below. Lucas' petition for discretionary review must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this JURISDICTIONAL BRIEF has been sent by U.S. mail to Eugene Lucas, *pro se*, DOC# J37645, Hamilton Correctional Institution, 10650 S.W. 46th Street, Jasper, Florida 32052-1360; on August 8, 2011. I also certify this brief complies with Fla.R.App.P. 9.210.

CHARLIE MCCOY

Senior Assistant Attorney General

APPENDIX

(DECISION UNDER REVIEW)

EUGENE LUCAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D08-6160

Opinion filed May 6, 2010.

An appeal from the Circuit Court for Duval County.

Linda F. McCallum, Judge.

Nancy A. Daniels, Public Defender, Tallahassee, and James T. Miller, Special Assistant Public Defender, Jacksonville, for Appellant. Bill McCollum, Attorney General, and Charlie McCoy, Sr. Assistant Attorney General, Tallahassee, for Appellee.

CLARK, J.

Eugene Lucas appeals from the judgment and sentence imposed after a jury found him guilty of First Degree Murder and Attempted First Degree Murder. The only issue raised on appeal which merits comment is Mr. Lucas' claim that the trial court erred in sending a video cassette player into the jury room during deliberations, to enable the jury to view an exhibit in evidence -- the videotape of his voluntary statement to the police.

The video recording was played for the jury during trial, transcribed by the court reporter into the record, and the videotape itself was admitted into evidence. Mr. Lucas testified on his own behalf at trial. Over the objection of Mr. Lucas, the trial judge provided the jury with the means to review the videotaped statement in the jury room.

The videotaped statement was not a deposition or out-of-court witness testimony. It was thus not excepted from the general rule allowing things received in evidence to be taken to the jury room under Florida Rule of Criminal Procedure 3.400(a)(3) and Young v. State, 645 So. 2d 965 (Fla. 1994). Mr. Lucas' statement was against his interest, contained admissions of fact and details of the crimes, and there was no question that the statement was freely and voluntarily given after Mr. Lucas acknowledged his constitutional rights. The police statement was not a substitute for Mr. Lucas' live testimony at trial. Compare Barnes v. State, 970 So.2d 332 (Fla. 2007) (written transcript of defendant's testimony in previous trial not properly allowed in jury room as exhibit for second trial; jury might question defendant's decision not to testify in second trial).

The statement Mr. Lucas gave to the police was a confession. As was the case in Thomas v. State, 878 So. 2d 458 (Fla. 5th DCA 2004), the trial court's decision to allow the jury to have access to the videotaped confession in the jury room was within the court's sound discretion and there was no abuse of that discretion.

AFFIRMED.

BENTON and VAN NORTWICK, JJ., CONCUR.