

IN THE SUPREME COURT OF FLORIDA

REGINALD THOMAS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC11-1255

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Reginald Thomas, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the lower tribunal, attached in slip opinion form as "Appendix A". It also can be found at 36 Fla. L. Weekly D786a (Fla. 1st DCA April 14, 2011):

Reginald Thomas appeals his conviction for selling cocaine within 1000 feet of a school, contrary to section 893.13(1)(c), Florida Statutes (2006), and possession of cocaine with intent to sell within 1000 feet of a school, contrary to section 893.139(1)(c), Florida Statutes (2006). Thomas argues that these dual convictions, which involved the same quantum of cocaine, run afoul of the constitutional prohibition against double jeopardy as these offenses "are degrees of the same offense."

SUMMARY OF ARGUMENT

Petitioner does not set forth express and direct conflict, but rather contends that the First District misapplied the holding in McCloud by extending it to the answer to McCloud's certified question. The First District did not misapply McCloud's holding, but rather, followed it expressly.

ARGUMENT

ISSUE I: WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL DIRECTLY AND EXPRESSLY CONFLICTS WITH THIS COURT'S DECISION IN STATE V. MCCLOUD, 577 SO. 2D 939 (FLA. 1991) (RESTATED)

A. *The Decision of the District Court of Appeal Did Not Directly and Expressly Conflict with this Court's Decision in State v. McCloud, 577 So. 2d 939 (Fla. 1991).*

After expressing his disagreement with the First District's decision, Petitioner does not set forth express and direct conflict, but rather contends that the First District misapplied the holding in McCloud by extending it to the answer to McCloud's certified question. This is not a meritorious basis of jurisdiction.

1. Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides:

The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed

petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, 485 So. 2d at 830; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting or concurring opinion"). Thus, conflict cannot be based upon "unelaborated per curiam denials of relief," Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002).

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Accordingly, the determination of conflict jurisdiction distills to whether the District Court's decision reached a result opposite State v. McCloud, 577 So. 2d 939 (Fla. 1991).

2. The decision below is not in "express and direct" conflict with State v. McCloud, 577 So. 2d 939 (Fla. 1991).

In this case, the First District held that Petitioner's convictions for

selling cocaine within 1000 feet of a school and possession of cocaine with intent to sell within 1000 feet of a school did not violate double jeopardy, even though the same quantity of cocaine was at issue in both offenses. In coming to this conclusion, the First District relied on this Court's decision in State v. McCloud, 577 So. 2d 939 (Fla. 1991).

In McCloud, this Court found the defendant's convictions for both sale of cocaine and possession of cocaine did not violate double jeopardy. Specifically, this Court answered the following certified question of great public importance in the negative:

When a double jeopardy violation is alleged based on the crimes of sale and possession (or possession with intent to sell) of the same quantum of contraband and the crimes occurred after the effective date of section 775.021, Florida Statutes (Supp. 1988), is it improper to convict and sentence for both crimes?

McCloud, 577 So. 2d at 939-40 (underline added).

Petitioner now asserts that the First District misapplied McCloud's holding because it examined the question that was expressly certified to this Court in McCloud, which expressly and unambiguously included the offense of possession with intent to sell. Petitioner alleges that because the defendant in McCloud was only convicted of simple possession, that the inclusion of possession with intent to sell in the certified question, was merely dicta which should not be relied upon. This is meritless. The First District did not misapply McCloud's holding, but rather, followed it expressly. This Court expressly considered the certified question, which

expressly referenced "possession with intent to sell," and answered the question in the negative. McCloud, 577 So. 2d at 939-40. That is a holding, not dicta. Nevertheless, even if McCloud's reference with possession with intent to sell were *dicta*, that would only further demonstrate there is no conflict with this Court's McCloud's holding at all.

In reality, what Petitioner's tortured reasoning is actually asserting is that this Court has jurisdiction because McCloud is wrongly decided and that the First District's decision is in conflict with what McCloud should have (in his view) concluded. The inquiry is not whether the First District's decision expressly conflicts with what Petitioner believes McCloud should have held; the inquiry whether the First District's decision expressly and directly conflicts with what this Court actually held in McCloud. It does not. Petitioner has utterly failed to demonstrate a direct and express conflict between the First District's decision and this Court's decision in McCloud.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court determine that it does not have jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by
U.S. MAIL on **July 18, 2011** to Glen P. Gifford Esq., Assistant Public
Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street,
Tallahassee, FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12
point font.

Respectfully submitted and certified,
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