IN THE SUPREME COURT OF FLORIDA

RAYMOND KELLY

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Supreme Court Case No:

DCA No.: 4D09-2436
Lower Tribunal No.: 06-21674CF10A

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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INTRODUCTION

The Petitioner seeks discretionary review of a Fourth District Court of Appeal decision that conflicts with decisions of this court and of other District Courts as to the application of the harmless error doctrine. The symbol "A:" refers to the lower court opinion, set forth in the Appendix.

The Petitioner, RAYMOND KELLY, was the Defendant and Appellant in the Fourth District Court of Appeal. Respondent, The State of Florida, was the prosecution in the trial court and the Appellee in the Fourth District Court of Appeal.

STATEMENT OF FACTS AND CASE

The Petitioner was convicted of armed sexual battery, kidnapping, robbery, and impersonating an officer. This trial took place before the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. The Petitioner was sentenced to life in prison.

An appeal challenging the denial of the Appellant's Motions to Suppress were taken to the Fourth District Court of Appeal. On January 11, 2012, the District Court authored an opinion affirming the decision of the trial court. See Appendix Item A. Although the Appellate court found that a red bag pack containing incriminating evidence was the product of an unlawful search and seizure, the Appellate court nevertheless found that its admission constituted

harmless error. A timely Motion for Rehearing was filed, but it was subsequently denied without opinion on February 14, 2012.

The pertinent facts as found by the District Court are (A: 7-8):

> The incident giving rise to the charges, the facts of which we briefly recite, began with the victim seeking a ride on a street corner after having left a party. A man approached her, claiming to be a detective, and offered assistance. Instead, he placed her in his car, blindfolded, bound and gagged her, and drove her to another area where he committed various sexual batteries upon her, taking pictures as he did so. He then let her go. Eventually, the police found her and took her to a sexual assault center. Later, after they had developed a suspect, they showed her a photo lineup where she positively identified Kelly as her attacker. DNA swabs taken from her body proved a positive match for Kelly's DNA.
>
> Police connected Kelly to the crimes through papers left in a dumpster two blocks from the crime scene of a different sexual battery victim. The papers identified Cynthia Morales (Kelly's girlfriend). Officers located Morales who identified Kelly in a surveillance photograph taken at a nearby gas station. Morales consented to a search of her home, and evidence was taken, including several cameras.
>
> As a result, police arrested Kelly, and he was taken to the police Station where he was given Miranda warnings and talked to police. In that statement, Kelly told the officer that he had met a woman at the beach who had posed nude for him. The victim looked like the woman he had met, but he denied having sex with her. He consented to a DNA sample, a computer search, and a camera search. In his briefcase, which was in his possession at the time of the interview, the officers found the victim's camera and discovered pictures from that camera on his laptop computer.

> Kelly testified at trial, denying all of the charges, and claiming that the pictures on the laptop were put there by a friend. The jury found him guilty, and the court convicted him and sentenced him to life in prison as a habitual felony offender and dangerous sexual offender, resulting in this appeal.

The District Court stated the following facts pertaining to the unlawful search (A: 10):

> Kelly lived with his girlfriend Cynthia Morales in her home. When the officers associated her with Kelly, they asked to search her home. She consented, and the officers searched and seized cameras, computers, and items connected with various crimes they were investigating. Two day later, after listening to a tape recording of a conversation between Kelly and Morales at the jail, the officers heard Kelly tell Morales to get rid of a red backpack. They asked Morales if they could search her home again. She consented and let them search the area. They found the red backpack in the garage and searched it, finding evidence connected with this crime.

The District Court ruled as follows with respect to the search and seizure of the red bag (A: 12):

> Under these circumstances we cannot conclude that Morales had authority to consent to the search of the red bag. Therefore, the search violated the Fourth Amendment.
>
> Nevertheless, we conclude that the admission of the evidence in the red bag was harmless beyond a reasonable doubt. See *State v. DiGuillo*, 491 So.2d 1129, 1139 (Fla. 1986). The relevant evidence from that bag constituted flex cuffs and blue tape which were used by Kelly on the victim during the sexual battery. Pictures admitted in evidence from Kelly's computer also showed the victim with blue tape on her eyes and flex cuffs on her writs. In addition, Kelly's DNA was

> found her body, and her camera and Blackberry were found in his possession, thus tying him to the victim. That Kelly had possession of similar flex cuffs and blue tape in his backpack did not add material evidence to the State's case that was not already confirmed with other evidence. Despite the Fourth Amendment violation, we conclude that the error does not merit reversal.

This timely jurisdictional brief ensues.

SUMMARY OF ARGUMENT

The Petitioner contends that the decision of the Fourth District Court of Appeal expressly and directly conflicts with decisions from this Honorable Court, namely *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986) and *Ventura v. State*, 29 So.3d 1086 (Fla. 2010).

The decision rendered below is in conflict with the harmless error doctrine set forth in *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), because it credits all of the State's evidence in assessing whether the admission of the context of the unlawfully seized red bag was harmless. In other words, the District Court improperly utilized an overwhelming evidence of guilt standard, in direct and express conflict with *DiGuillo* and in *Ventura*, which condemned the use of this standard.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030 (a)(2)(A)(iv).

It is not necessary for the District Court to state in the opinion that its decision is in conflict, as long as the conflict can be identified by the expression of

the legal principles in each case. See *Ford Motor Company v. Kikis*, 401 So.2d 1341 (Fla. 1981) ("A discussion of the legal principles which the [district] court applied supplies a sufficient basis for a petition for conflict review under Section 3(b)(3)"). Id. at 1342.

The Supreme Court further explained that one of the tests of express and direct conflict is whether it has been shown from the opinions that the two decisions are irreconcilable or form the misapplication of a decision of the Supreme Court and/or of another district court. See *Aravena v. Miami-Dade County*, 928 So.2d 1163, 1166-67 (Fla. 2006); *Crossley v. State*, 596 So.2d 447,449 (Fla. 1992) (concluding that "because the court below reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated the result reached by the alleged conflict case, a conflict of decision existed that warranted accepting jurisdiction."). Id.

ARGUMENT I

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH THE HARMLESS ERROR DOCTRINE IN *STATE V. DIGUILIO*, 491 So.2d 1129 (Fla. 1986) AND *VENTURA V. STATE*, 29 So.3d 1086 (Fla. 2010) BECAUSE AN IMPROPER OVERWHELMING EVIDENCE STANDARD WAS UTILIZED IN ASSESSING THE EFFECT OF THE UNLAWFULLY SEIZED EVIDENCE ON THE JURY.

In *DiGuilio*, this Honorable Court opined that once an error is determined, the burden is upon the State to prove beyond a reasonable doubt that the error from which it benefitted did not contribute to the verdict. *DiGuilio* at 1135. This Honorable Court recognized that "[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result". *DiGuilio* at 1136.

In the case *sub judice*, the relevant evidence from the bag constituted flex cuffs and blue tape which were used by the Petitioner on the victim during the sexual battery. (A: 12). Photographs that were admitted into evidence showed the exact blue tape on the victim's eyes and flex cuffs on her wrists. (A: 12). The jury heard testimony that the detectives heard a taped recorded conversation between

the Petitioner and his girlfriend at the jail, requesting that Morales get rid of the red back pack, the same one that contained the incriminating evidence. (A: 10). The prosecutor also relied upon this evidence in his closing argument. This error was not harmless.

In concluding that the admission of this evidence was harmless, the District Court approached the harmless error analysis by crediting all of the other evidence submitted to the jury and giving no weight to the evidence that was admitted as a result of an unlawful search and seizure. By doing so, the District Court utilized an overwhelming evidence standard, or even perhaps a "but – for" standard, which directly and expressly conflicts with the standard articulated in *DiGuilio* and which was expressly condemned in *Ventura*.

Importantly, in *Ventura v. State*, 29 So.3d 1086 (Fla. 2010), this Honorable Court accepted jurisdiction, inter alia, because in a similar situation because the Third District Court of Appeal improperly utilized an overwhelming evidence test. Specifically, the Third District Court held that the error in that case was "harmless beyond a reasonable doubt given the overwhelming evidence of guilt". *Ventura v. State*, 973 So.2d 65, 67 (Fla. 3d DCA 2008).

In the case *sub judice,* the Fourth District Court of Appeal utilized the same overwhelming evidence standard that this Honorable Court relied upon when

granting jurisdiction in *Ventura*. Although the Fourth District did not use the word overwhelming, the analysis that it utilized clearly demonstrates that it relied upon this improper overwhelming, or even a "but – for" standard. As such, the Petitioner respectfully requests that this Honorable Court, like in *Ventura*, accept jurisdiction to resolve this conflict.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below and the Court should exercise that jurisdiction to consider the merits of the Petitioner's arguments.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Jurisdictional Brief has been furnished by U.S. Mail and efiling to the Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399 and to the Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 on this _____ day of _____, 2012.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, RAYMOND KELLY, hereby certifies this Jurisdictional Brief is printed in 14-point Times New Roman font, as required by the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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