

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DANIEL CANADY,

Petitioner,

v.

S. Ct. Case No. _____
(DCA No. 5D11-1715)

STATE OF FLORIDA,

Respondent.

_____ /

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

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida, filed an information in circuit court case number 10-2582-CF charging Petitioner with possession of cocaine (see §§ 893.03(2)(a)(4), 893.13(6)(a), Fla. Stat. (2010)), driving while license cancelled, suspended or revoked as a habitual traffic offender (see §§ 322.34(5), 322.264, Fla. Stat. (2010)) and possession of paraphernalia (see §§ 893.145, 893.147, Fla. Stat. (2010)).

Petitioner filed a motion to suppress evidence of his identity and any alleged controlled substances. The circuit court entered a written order denying the motion to suppress.

Petitioner subsequently entered a negotiated plea of nolo contendere to each count as charged. He specifically reserved the right to appeal the denial of the motion to suppress.

The circuit court sentenced Petitioner for possession of cocaine and for driving while license cancelled, suspended or revoked as a habitual traffic offender to concurrent terms of 42 months in prison. The court ordered that he be allowed 202 days credit time served on each count. On the count of possession of paraphernalia, the court sentenced him to time served. The court ordered all counts to run consecutive to the sentence imposed in lower court case number 35 2010

CF 002735-001.

Petitioner appealed to the Fifth District Court of Appeal and argued that Florida's drug possession statute is unconstitutional for failure to include a scienter element. See *Shelton v. Secretary, Department of Corrections*, 23 Fla.L.Weekly Fed. D11(M.D. Fla. July 27, 2011). On February 14, 2012, the Fifth District Court of Appeal issued an opinion affirming Petitioner's judgment and sentences thus rejecting Petitioner's attack on the constitutionality of Chapter 893. In doing so, the district court cited *Flagg v. State*, 1D11-2372 (Fla. 1st DCA Oct. 13, 2011), wherein the First District Court of Appeal rejected the Shelton rationale. (Copy of opinion from the Fifth District attached as Appendix hereto)

Petitioner filed a timely notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

Where a district court of appeal cites as authority for its affirmance, a decision of another district court of appeal which is currently pending review in this Court, the Supreme Court has jurisdiction to accept the case for review.

ARGUMENT

THIS COURT HAS DISCRETIONARY
JURISDICTION TO ACCEPT THE DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL BELOW
FOR REVIEW.

Petitioner raised the constitutionality of Chapter 893 on the grounds that a Federal District Court judge had declared the statute unconstitutional for failure to include a scienter element. *See Shelton v. Secretary, Department of Corrections*, 23 Fla.L.Weekly Fed. D11(M.D. Fla. July 27, 2011). The Fifth District Court of Appeal issued an opinion in the instant case on February 14, 2012, affirming Petitioner's judgments and sentences and rejecting the challenge to the constitutionality of the statute. In doing so, the Fifth District cited to the decision of the First District Court of Appeal in *Flagg v. State*, 1D11-2372 (Fla. 1st DCA Oct. 13, 2011), wherein that Court held that the decision of the Federal District Court was not binding on state courts and since state courts had previously upheld the constitutionality of Chapter 893, it saw no reason to revisit the issue. The First District also recognized that the issue was squarely before this Court having been certified for immediate resolution by the Second District Court of Appeal in *State v. Adkins*, 71 So. 3d 184 (Fla. 2nd DCA 2011). This Court granted review in *Adkins* and has recently held oral arguments thereon. *See State v. Adkins*, 71 So. 3d 117 (Fla. October 12, 2011). A petition for discretionary review was filed in

Flagg on November 21, 2011 and is currently pending before this Court in Case No. SC11-2282.

In *Jollie v. State*, 405 So. 2d 418 (Fla. 1981), this Court held that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court continues to constitute prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. This Court continues to adhere to the *Jollie* principle. See *Jackson v. State*, 64 So. 3d 1209 (Fla. 2011). Therefore, this Honorable Court has the jurisdiction to accept the instant case for discretionary review.

CONCLUSION

Based on the foregoing reasons and authorities cited herein, this Honorable Court should accept the instant case for review, quash the decision of the Fifth District Court of Appeal and remand with instructions to vacate the judgment of conviction for possession of cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118 and mailed to Daniel Canady, No.U01204, Santa Rosa Annex, 5850 East Milton Road, Milton, FL 32583 on this 14th day of March, 2012.

for: AILENE S. ROGERS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman font.

for: AILENE S. ROGERS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA

DANIEL LAMAR CANADY,)
)
Petitioner,)
)
vs.)
)
STATE OF FLORIDA,)
)
Respondent.)
_____)

Case No. SC-
DCA No. 5D11-1715

APPENDIX

Fifth District Court of Appeal decision

PETITIONER'S BRIEF ON JURISDICTION

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