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IN THE SUPREME COURT OF FLORIDA

ALVIN MITCHELL,

Petitioner,

vs.

Case No. SC13-1260

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
THE FOURTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

The respondent, State of Florida, was the prosecution in the trial court and the appellee before the Fourth District Court of Appeal. The respondent will be referred to herein as “the State.” The petitioner, Alvin Mitchell, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. The petitioner will be referred to as “petitioner.”

STATEMENT OF THE CASE AND FACTS

The trial court denied petitioner’s Rule 3.850 motion on December 21, 2010, and the trial court served a copy of the order on petitioner on December 27, 2010. (JB. Ex. A & D). Petitioner filed a motion for rehearing on January 18, 2011, which was untimely. (JB. Ex. D). Petitioner’s untimely motion for rehearing did not defer the rendition of the trial court’s December 21, 2010 order. Id. Thus, petitioner had until January 20, 2011 to appeal the trial court’s order. Id. Petitioner, however, did not file a notice of appeal until May 20, 2011. Id.

Petitioner subsequently filed a petition for belated appeal, which was denied by the Fourth District. (JB. Ex. E). Petitioner’s motion for rehearing was denied. (JB. Ex. F). Petitioner then sought review in this Court.

SUMMARY OF ARGUMENT

Issue I The Fourth District's ruling in this case does not conflict with Peede v. State, 748 So. 2d 253 (Fla. 1999), or any other case. Petitioner's appeal from the trial court's order was untimely, and the Fourth District did not have jurisdiction over the appeal. The Fourth District dismissed petitioner's case due to a lack of jurisdiction, and it did not address petitioner's substantive issues in any way, shape, or form. The Court should dismiss this case for lack of jurisdiction because the Fourth District's order does not expressly and directly conflict with any other case.

Issue II The Fourth District's ruling does not conflict with Showers v. State, 359 So. 2d 928 (Fla. 2d DCA 1978). Petitioner's notice of appeal was untimely because his untimely motion for rehearing did not delay rendition of the trial court's order. No "state action" prevented petitioner from timely appealing the trial court's ruling in this case, and the Court should decline jurisdiction over the case.

ARGUMENT

ISSUE I

**THERE IS NO BASIS FOR DISCRETIONARY
REVIEW OF THE DECISION OF THE DISTRICT
COURT**

Petitioner seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, section 3(b)(3), of the Constitution of the State of Florida. Specifically, petitioner contends the Fourth District's decision in the instant case conflicts with this Court's decision in Peede v. State, 748 So. 2d 253 (Fla. 1999). For the reasons set forth below, there is no conflict and this Court should not exercise jurisdiction over this case.

In order for conflict jurisdiction to exist, 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). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Id.; 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).

Petitioner's appeal from the trial court's order in this case was untimely, and the Fourth District properly dismissed petitioner's case due to a lack of jurisdiction. No substantive issues were addressed in the Fourth District's one-line denial of petitioner's request for a belated appeal in this case. (JB. Ex. E). This Court's decision in Peede does not deal with the dismissal of a defendant's untimely appeal. Thus, the Court should decline jurisdiction over this case because

there is no express and direct conflict between Peede and the Fourth District's order below.

ISSUE II

THERE IS NO BASIS FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT

Petitioner claims the Fourth District's ruling in this case conflicts with Showers v. State, 359 So. 2d 928 (Fla. 2d DCA 1978), but fails to explain how. Petitioner's notice of appeal was untimely because his untimely motion for rehearing did not delay rendition of the trial court's order. No "state action" prevented petitioner from timely appealing the trial court's ruling in this case, and Showers is factually distinguishable because the defendant in that case filed a timely notice of appeal. Id. at 928.

The law is clear that if the two purportedly conflicting cases are distinguishable in their controlling factual elements, then no conflict jurisdiction exists. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962); Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983)(where case was before this Court on apparent conflict, but case was distinguishable on its facts, this Court would discharge jurisdiction). Simply put, conflict jurisdiction does not exist over a case when it is factually distinguishable from the case it allegedly conflicts with. Ackers v. State, 614 So. 2d 494, 495 (Fla. 1993). Because the instant case and Showers are

factually distinguishable, the Court should not exercise its jurisdiction over this case.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the State respectfully requests this Honorable Court decline to accept jurisdiction over this case.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished via U.S. mail to: Alvin Mitchell, DC#B03839, South Bay Correctional Facility, P.O. Box 7171, South Bay, FL 33493-7171, on July 22, 2013.

/s/ Richard Valuntas
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman 14 point type and complies with the font requirements of Rule 9.210.

/s/ Richard Valuntas
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