Electronically Received 09/27/2013 09:34:24 AM

RECEIVED, 9/27/2013 09:38:44, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC13-1411

ALBERTO CARTAGENA,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

DON M. ROGERS
Assistant Attorney General
Florida Bar No. 0656445

1515 North Flagler Drive, Ninth Floor
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Respondent

Table Of Contents

Page:

Table Of Citations

Cases: **Page:**

Constitutional Provisions: **Page:**

Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

A copy of the opinion issued by the Fourth District Court of Appeal is attached as Appendix A.

Statement Of The Case And Facts

Noting that in determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1988), and Reaves v. State, 485 So. 2d 829 (Fla. 1986), respondent will set out the facts of the case as stated in the majority opinion below.

> Based upon a DNA match in 2008, the state prosecuted appellant for an armed sexual battery and armed burglary which occurred in 1996. The statute of limitations barred the burglary conviction, but appellant was convicted of armed sexual battery. Appellant claims that the trial court erred in refusing to allow him to waive his statute of limitations defense as to the lesser-included offenses for armed sexual battery. Had the trial court accepted the defendant's waiver, the jury could have been instructed on the lesser-included offenses of sexual battery, attempted sexual battery, aggravated assault, and battery. Because the defendant asserted a statute of limitations defense and succeeded in having the burglary charges dismissed, we agree with the trial court that the defendant cannot selectively waive his statute of limitations defense as to the charges arising out of the criminal episode. We thus affirm.
>
> On May 15, 1996, S.G. was sexually assaulted in her home by an intruder armed with a knife. It was not until 2008 that the defendant became a suspect. In April 2008, after the defendant's DNA was determined to be a match to that found at the scene of the crime in 1996, the defendant was charged with sexual battery while armed with a knife, a life felony, and burglary while armed. The defendant obtained the dismissal of the burglary charge based upon the running of the statute of limitations. At his subsequent trial on the armed sexual battery charge, the defendant sought to waive his statute of limitations defenses as to the lesser-included offenses for the armed sexual battery so as to be entitled to have the jury instructed on these lesser offenses.

The trial court refused to accept the waiver, reasoning that, having successfully asserted a statute of limitations defense to obtain the dismissal of the one charge, the defendant could not now waive his statute of limitations defense as to the lesser-included offenses of the other charge. The jury found the defendant guilty of the only offense put before it—armed sexual battery. The defendant insists that the trial court's refusal to permit him to waive his statute of limitations defense so as to entitle him to have the jury instructed on the lesser-included offenses of armed sexual battery was error.

...

The issue presented in this case is whether a defendant who successfully asserts the statute of limitations to bar some offenses occurring out of a criminal episode can then waive the statute of limitations in order to have the jury instructed on other lesser-included offenses of the charges. In this case, the defendant successfully raised the statute of limitations to bar the prosecution of the armed burglary charge and then sought to waive the statute of limitations as to the lesser offenses of sexual battery. At trial, the defense attorney informed the judge that his client would seek to waive the statute of limitations defense as to the lesser-included offenses for armed sexual battery. He did not withdraw his assertion of the statute of limitations defense as to the armed burglary charge.

...

We agree with Rembert[v. State, 476 So. 2d 721 (Fla. 1st DCA 1985)] that, where the defendant has asserted the statute of limitations to prevent prosecution of some charged crimes arising out of the same criminal episode to avoid prosecution for those crimes, he cannot then assert the statute of limitations to secure the possibility of reducing his punishment as to crimes for which he still is being prosecuted.

...

Where the defendant may still be prosecuted for acts arising out of the same episode which are not barred by a statute of limitations, the statute does not provide protection to the defendant in his defense.

> Instead, it operates simply to reduce his exposure to punishment for all relevant crimes. Because it is not a constitutional violation, we conclude that the trial court did not err in refusing the appellant's waiver.
>
> Finally, even if the appellant were allowed to waive the statute of limitations to permit the jury to consider lesser-included offenses, we would hold, as the court did in Rembert, that he did not fulfill his burden to comply with Tucker. As such, the record does not support his position that he was entitled to the lesser-included offense instructions.

Judge Stevenson authored a dissenting opinion in which he stated that the defendant was entitled to the instructions on the lesser included offenses and he would reverse and remand the case for a new trial. Cartagena v. State, 38 Florida Law Weekly D1017 (Fla. 4th DCA May 8, 2013)

Summary Of The Argument

This Court does not have jurisdiction to review the instant case. The decision of the Fourth District Court of Appeal in the instant case, Cartagena v. State, 38 Florida Law Weekly D1017 (Fla. 4th DCA May 8, 2013), does not expressly and directly conflict with this Court's decisions in Eaddy v. State, 638 So. 2d 22 (Fla. 1994) and Heathcoat v. State, 442 So. 2d 955 (Fla. 1983). Therefore, this Court should deny discretionary review of the case at bar.

Argument

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT IN EADDY V. STATE, 638 So. 2d 22 (Fla. 1994) and HEATHCOAT V. STATE, 442 So. 2d 955 (Fla. 1983)

Article V, § 3(b)(3) of the Florida Constitution restricts this Court's review of a district court of appeal's decision only if it **expressly** conflicts with a decision of this Court or of another district court of appeal. It is not enough to show that the district court's decision is effectively in conflict with other appellate decisions. However, this Court's jurisdiction to review the Fourth DCA's decision in this case may be invoked by either the announcement of a rule of law which conflicts with a law previously announced by this Court or another district court of appeal or by the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case. Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court as mandatory authority. See generally Jenkins v.

State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[if] the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict cannot arise." Id. at 887.

When determining whether conflict jurisdiction exists, this Court is limited to the facts which appear on the face of the opinion. Hardee v. State, 534 So. 2d 706, 708 n (Fla. 1986). In the past, this Court has held that it would not exercise its discretion where the opinion below established no point of law contrary to the decision of this Court or of another district court of appeal. The Florida Star v. B.J.F., 530 So. 2d 286, 289 (Fla. 1988). "'Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." State, Department of Health v. National Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986) (quoting Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986)). See also School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985, 986 (Fla. 1985).

The Fourth DCA's opinion in no way conflicts with this Court's opinions in

Eaddy v. State, 638 So. 2d 22 (Fla. 1994) and Heathcoat v. State, 442 So. 2d 955 (Fla. 1983).

In the majority decision below the Fourth District describes in detail why their opinion is distinguishable and therefore not in conflict with Eaddy v. State, 638 So. 2d 22 (Fla. 1994) as follows.

> Eaddy is distinguishable because it involved the imposition of the death penalty. Constitutionally, the defendant was entitled to instructions on lesser-included offenses, and the trial court could not refuse to accept a waiver of such defenses. The defendant could not be faced with "a 'Hobson's choice' [which] enhanced the risk of an unwarranted conviction for first-degree murder," and thus imposition of the death penalty, which was the very concern of the United States Supreme Court in Beck.

Likewise the opinion is not in conflict with this court's decision in State v. Heathcoat, 422 So. 2d 955 (Fla. 1983) . Heathcoat is only mentioned in Judge Stephenson's dissenting opinion. "Neither a dissenting opinion nor the record itself can be used to establish jurisdiction." Reaves v. State, 485 So. 2d 829 (Fla. 1986). In Heathcoat this court reviewed a certified question from the district court regarding whether there had to be an objection to the denial of a requested jury instruction for the issue to be preserved for appellate review. In contrast, below the issue involved whether the trial judge erred in denying the defendant's request to waive of the statute of limitations defense in a life felony prosecution when the

defendant had already utilized the statute of limitations to have a lesser crime, occurring in the same criminal transaction, dismissed. The issue this court reviewed in Heathcoat is obviously dramatically different from the issue the Fourth District decided in the present case. No conflict exists. Accordingly, this Court should decline to review the lower court's decision in this case.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court should decline to accept jurisdiction.

Respectfully submitted,

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

/s/ Celia A. Terenzio
_____
CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

/s/ Don M. Rogers
_____
DON M. ROGERS
Assistant Attorney General
Florida Bar No. 656445
1515 North Flagler Drive, Ninth Floor
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Respondent

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Alberto Cartagena, DC no. W16911, Everglades Correctional Facility, 1599 SW 187th Ave., Miami, FL. 33194 and a PDF copy has been filed with this court through the portal at myflcourtaccess.com on September 27, 2013.

/S/ Don M. Rogers

_____
DON M. ROGERS
Assistant Attorney General

Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Appellee hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

/s/ Don M. Rogers

_____
DON M. ROGERS
Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC13-1411

ALBERTO CARTAGENA,

Petitioner,

- versus -

STATE OF FLORIDA,

Respondent.

RESPONDENT'S APPENDIX

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

CELIA A. TERENZIO
Assistant Attorney General
Chief, West Palm Beach Bureau
Florida Bar No. 0656879

DON M. ROGERS
Assistant Attorney General
Florida Bar No. 0656445

1515 North Flagler Drive, Ninth Floor
West Palm Beach, FL 33401
Tel: (561) 837-5000
Fax: (561) 837-5099

Counsel for Respondent