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IN THE SUPREME COURT OF FLORIDA

ERIC WALKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC14-1214

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

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This brief will refer to Petitioner as such, Defendant, or by proper name, e.g., "Walker." Respondent, the State of Florida, was the prosecution below; the brief will refer to Respondent as such, the prosecution, or the State. The following are examples of other references:

A = Appendix

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Respondent maintains that facts contained in Petitioner's Statement of the Case and Facts are not set out in the opinion of the Fourth District Court of Appeal. Facts outside of the opinion should not be considered. See Reaves v. State, 485 So. 2d 829, 830 n. 3 (Fla. 1986).

Petitioner was convicted for robbery with a deadly weapon and burglary of a dwelling with an assault or battery while armed with a firearm and wearing a mask (A. 2). The victim testified that someone grabbed him from behind and held a gun six inches from his head (A. 2). He described the gun as a "snub nose revolver type, brushed silver and was - to my belief a .38 revolver." (A. 2). The victim was familiar with firearms (A. 2). He said that he could see the bullets in the chamber (A. 2). When Petitioner was arrested, the police discovered a rag wrapped around eight rounds of .38 caliber ammunition in his back pocket (A. 3).

The State was permitted to use a .38 gun as a demonstrative aid to show the jury how the victim could see the ammunition in the gun when he was threatened (A. 2). On appeal, the Fourth District held that it was not an abuse of discretion for the trial court to permit the use of the gun, which was never admitted into evidence, as a demonstrative aid (A. 3-4). It indicated that the gun was relevant to the issue of identity (A.

4). It pointed out that the trial court instructed the jury before the gun was used that the firearm was not obtained in the case and that no firearm was ever recovered and that the gun was being used as a demonstrative aid and was not related to the case (A. 3-4).

SUMMARY OF ARGUMENT

The opinion of the district court is not in direct and express conflict with the decisions cited by Petitioner. Petitioner has failed to show that this court has jurisdiction to review the opinion of the district court. This court should decline to review this cause on the merits.

ARGUMENT

ISSUE I: THE FOURTH DISTRICT'S OPINION IS NOT IN DIRECT AND EXPRESS CONFLICT WITH THE CASES CITED BY PETITIONER.

This Honorable Court has authority pursuant to Article V, Section 3(b)(3) of the Florida Constitution (1980) to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. See The Florida Bar v. B.J.F., 530 So. 2d 286, 288 (Fla. 1988). This Court in Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975) made it clear that its "jurisdiction to review decisions of courts of appeal because of alleged conflicts is invoked by (1) the announcement of a rule of law to produce a different result in a case which conflicts with a rule previously announced by this

court or another district, or (2) 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. In this second situation, the facts of the case are of the utmost importance." [emphasis added]. See also Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) ("cases which are cited for conflict that are distinguishable on their facts will not vest this Court with jurisdiction").

The State maintains that the opinion of the Fourth District in this case is not in direct and express conflict with decisions cited by Petitioner. The first case to which Petitioner cites, Green v. State, 688 So. 2d 301 (Fla. 1997), involves two issues: the cross-examination of a defense eyewitness regarding her prior alcohol use and the admission of evidence obtained pursuant to an overbroad search warrant. This court analyzed the points that were deemed to be error in terms of harmless error. Here, this case involved neither issue, and, because no error was found, there was no discussion of harmless error.

The second case cited by Petitioner is Metayer v. State, 89 So. 3d 1003 (Fla. 4th DCA 2012). Not only does this case not directly conflict with Metayer, which dealt with the actual admission of a firearm, it is also from the same district. Therefore, discretionary jurisdiction is not warranted. See Rule

9.030(2)(A)(iv), Florida Rules of Appellate Procedure (conflict must be based on conflict with a decision of another district court of appeal or with the supreme court)).

CONCLUSION

Based on the foregoing discussion, the State respectfully requests this Honorable Court to deny the petition for discretionary review.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been e-file at Florida e-Portal and furnished by U.S. mail to Eric Walker, DC #W17028, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026, on July 10th, 2014.

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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