

14-1363
PROVIDED TO MARTIN
CORRECTIONAL INSTITUTION
ON 9-2-74
FOR MAILING

IN THE SUPREME COURT OF FLORIDA

NELSON DELGADO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent. /

CASE NO.: SC14-

D.C.A. Case No.: 4D13-2288

L.T. Case No.: 08CF009567 AMB

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
Fourth District State of Florida.

2014 SEP 12 P 8:48
JUN 11 10:10 AM
LEON J. MARTIN COURT

Nelson Delgado; D.C. No.: B08193

Pro se

Martin Correctional Institution

1150 S.W. Allapattah Road

Indiantown, Florida 34956

TABLE OF CONTENTS

Table of Citations	ii
Statement of the Case and Facts	1
Summary of the Argument	2
Jurisdictional Statement	3
Argument	3
<p>The decision of the Fourth District Court of Appeal in this case expressly and directly conflicts with the decision of this Court in <u>State v. Drawdy</u>, 39 Fla. L. Weekly S209 (Fla. April 10, 2014).</p>	
Conclusion	4
Certificate of Service/Oath	5
Certificate of Compliance	

TABLE OF CITATIONS

State v. Drawdy, 39 Fla. L. Weekly S207 (Fla. April 10, 2014) 2, 3

STATEMENT OF CASE AND FACTS

The Petitioner was arrested on June 29, 2008, and charged with lewd and lascivious battery, pursuant to section 800.04(4)(a), of the Florida Statutes (2008), in the Fifteenth Judicial Circuit Court, in and for Palm Beach County, Florida. On September 17, 2008, the State amended the Information by adding the charge of lewd and lascivious molestation, pursuant to section 800.04(5)(a) and (c) 2, of the Florida Statutes (2008).

On January 21, 2010, the Petitioner began a trial by jury which ended on January 22, 2010. The jurors rendered guilty verdicts on both count one and two. Count One - lewd and lascivious battery; and Count Two - lewd and lascivious molestation. The trial court on its own motion vacated the jury's verdict on Count Two that same day at approximately 12:44 PM determining that the Defendant could not be found guilty on both counts. On February 2, 2010, the State moved the trial court for a written finding for a sexual predator designation to be placed on the Defendant. And, on March 3, 2010, the trial court entered an order declaring Mr. Delgado to be a sexual predator.

The Petitioner was sentenced on February 26, 2010, to 15-years of incarceration in the Florida Department of Correction (F.D.O.C.) on Count One only. At that time the trial court withheld adjudication on Count Two recognizing that a double jeopardy violation had occurred when the State amended the Defendant's Information by adding the second count, and the jury came back with a guilty verdict on that count. The Defendant filed a timely notice of appeal on March 22, 2010. Appellate counsel filed an Anders Brief claiming that no meritorious issues existed. The Fourth District Court of Appeal per curiam affirmed the Defendant's conviction and sentence on June 15, 2011. The mandate to that decision followed on July 15, 2011.

The Petitioner filed a timely motion for postconviction relief pursuant to rule 3.850, Fla. R. Crim. P. (2011) in the Fifteenth Judicial Circuit Court on December 16, 2011, which raised two issues of ineffective assistance of counsel. This motion was summarily denied by the trial court on November 28, 2012, with no records or files attached conclusively refuting the Defendant's claims for relief. The Petitioner failed to appeal the denial of that motion.

The Petitioner filed this instant petition with the Fourth District Court of Appeal on June 25, 2014. The outcome of this petition was stayed pending this Court's decision in State v. Drawdy, SC12-2012. Following that opinion by the Florida Supreme Court the Fourth District Court denied the petition on the merits citing State v. Drawdy, 39 Fla. L. Weekly S209 (Fla. April 10, 2014).

SUMMARY OF THE ARGUMENT

In this case the trial court vacated the Defendant's jury verdict of guilty on Count Two, which was one count of lewd and lascivious molestation citing double jeopardy concerns where the Defendant was also found guilty of one count of lewd and lascivious battery. Following this finding the trial court withheld adjudication on count two at the Defendant's sentencing despite this conviction being vacated at the conclusion of the Defendant's trial. The decision of the district court's staying of the Defendant's collateral criminal proceedings pending the outcome of State v. Drawdy, 39 Fla. L. Weekly S209 (Fla. April 10, 2014) was erroneous where the outcome of Drawdy, supra, had no bearing on the Defendant's case due to the fact that the trial court found a double jeopardy concern necessitated the vacating of the jury's verdict on count two of their findings. And, the only question was why the trial court found it necessary to withhold adjudication of a sentence for a crime that was vacated by the court following trial. Thus, the Petitioner

contends that the decision of the district court expressly and directly conflicts with a previous decision of this Court.

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).

ARGUMENT

This whole issue has been taken out of context insomuch that the gist of the argument at hand is not an actual double jeopardy violation, but an argument that once a trial court vacates a jury verdict on count 2 of a two count verdict that finding becomes fact, and any issue of guilt in reference to that charge becomes a nullity, as in the case at hand. This makes the Fourth District Court of Appeals' reliance upon State v. Drawdy, 39 Fla. L. Weekly S209 (Fla. April 10, 2014) an erroneous application of the law.

When one reads the transcripts to the conclusion of Mr. Delgado's trial it is a certainty that the trial court vacates the jury's guilty finding as to count 2: lewd and lascivious molestation. So, in essence Mr. Delgado was found guilty of lewd and lascivious battery and only lewd and lascivious battery. The Petitioner apologizes to this to this Court for his original misplaced double jeopardy argument and replaces that argument with the instant argument. All the Petitioner is now seeking is that his Judgment of Conviction and Sentence in this case reflect the trial court's factual

findings following his jury trial, which is a finding of lewd and lascivious battery after Count 2 of the guilty verdict was vacated by the trial court and the State failed to appeal that decision.

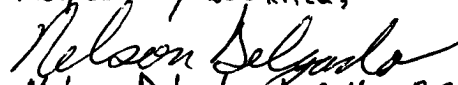
It was the trial court's erroneous withholding of adjudication at sentencing that initially caused the confusion. And, based upon clear and convincing evidence this Honorable Court should find that the trial court vacated the judgment of conviction on Count 2 of the jury's verdict following the Defendant's trial, which is wholly in its providence. As such, there should be no reflection of any conviction or sentence for lewd and lascivious molestation anywhere in the record and files of case number: 2008 CF 009567 AXX

CONCLUSION

In sum there has been an erroneous finding that the Defendant in this case has been found guilty of lewd and lascivious molestation where the record of this case states different. The remedy to this problem is for this Court to review the record of this case and issue an order clarifying that the trial court has vacated Count 2 of the jury's verdict in this case. As such, committing an error by withholding adjudication on Count 2 at the Defendant's sentencing.

Dated: September 2, 2014.

Respectfully submitted,



Nelson Delgado, D.C. No.: B08193

Martin Correctional Institution

1150 S.W. Allapattah Road

Indiantown, Florida 34956

UNNOTARIZED OATH

I HEREBY DECLARE that I speak and understand English, as such I comprehend the contents of the foregoing motion and the facts contained in said document are both true and correct.

Dated: September 2, 2014.

Submitted

Nelson Delgado; D.C. No.: B08193
Martin Correctional Institution

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five (5) copies have been served upon the Honorable Clerk of the Florida Supreme Court at: Supreme Court Bldg. 500 South Duval Street, Tallahassee FL 32399-1925 and that a true and correct copy of the foregoing brief has been served upon the Office of the Attorney General at: 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401 after this document was first turned-over to prison officials at Martin C.I. for mailing on this 2nd day of September, 2014.

Respectfully submitted,

Nelson Delgado

Nelson Delgado; D.C. No.: B08193

Martin Correctional Institution

1150 S.W. Allapattah Road

Indiantown, FL 34956

SEP 02 2014

14-1363
PROVIDED TO MARTIN
CORRECTIONAL INSTITUTION
ON 9-2-14
FOR MAILING

IN THE SUPREME COURT OF FLORIDA

NELSON DELGADO,
Petitioner,

v.

Case No.: SC14 -

DCA Case No.: 4D13-2288

STATE OF FLORIDA,
Defendant.

L.T. Case No.: 08CF009567 AMB

APPENIX

2014 SEP 11 P 8:48
JULIA A. HARRIS
CLERK OF THE COURT
BY _____

Nelson Delgado; D.C. No.: B08193
Pro se
Martin Correctional Institution
1150 S.W. Allapattah Road
Indiantown, Florida 34956

INDEX

A conformed copy of the district court order.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM
BEACH, FL 33401

May 28, 2014

CASE NO.: 4D13-2288

L.T. No.: 08CF009567AMB

NELSON DELGADO

v. STATE OF FLORIDA

Appellant / Petitioner(s)

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that this Court previously stayed this case pending the Florida Supreme Court's decision in *State v. Drawdy*, SC12-2012. The Florida Supreme Court has decided the matter which controls the outcome in this proceeding. The petition is denied on the merits. *State v. Drawdy*, 39 Fla. L. Weekly S209 (Fla. April 10, 2014).

GROSS, TAYLOR and LEVINE, JJ., Concur.

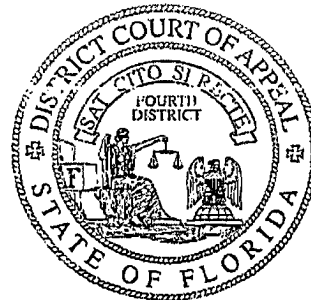
Served:

cc: Attorney General-W.P.B. Nelson Delgado

dl



LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



UNNOTARIZED OATH

I HEREBY DECLARE that the court document contained in the foregoing Appendix is true and correct.
Dated: September 2, 2014.

Submitted
Nelson Delgado
Nelson Delgado; D.C. No.: B08193
Martin Correctional Institution

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five (5) copies have been served upon the Honorable Clerk of the Florida Supreme Court at: Supreme Court Bldg. 500 South Duval Street, Tallahassee FL 32399-1925 and that a true and correct copy of the foregoing Appendix has been served upon the Office of the Attorney General at: 1515 N. Flagler Drive, Ste 900, West Palm Beach, FL 33401 after this document was first turned-over to prison officials at Martin C.I. for mailing on this 2nd. day of September, 2014.

SEP 02 2014

Respectfully submitted,
Nelson Delgado
Nelson Delgado; D.C. No.: B08193
Martin Correctional Institution
1150 S.W. Allapattah Road
Indiantown, FL 34956