

RECEIVED, 12/15/2014 15:03:45, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOE LEE,

Petitioner,

v.

Case No. SC14-2006
5D11-2319

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FIFTH DISTRICT
STATE OF FLORIDA

PAMELA JO BONDI
ATTORNEY GENERAL

ROBIN A. COMPTON
Assistant Attorney General
FL Bar No. 0846864

WESLEY HEIDT
Assistant Attorney General
FL Bar No. 0773026
444 Seabreeze Boulevard
Suite 500
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 Fax
CrimAppDAB@myfloridalegal.com

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSELY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL, THIS COURT OR THE UNITED STATES SUPREME COURT	4
CONCLUSION	8
CERTFICIATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE	9

TABLE OF AUTHORITIES

CASES:

<i>Anders v. California</i> , 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) ...	2
<i>Brugmann v. State</i> , 117 So. 3d 39 (Fla. 3d DCA 2013)	4
<i>Brugmann v. State</i> , 37 Fla. L. Weekly D1041 (Fla. 3d DCA April 27, 2012) .	4
<i>Dept. of HRS v. Nat’l Adoption Counseling Service, Inc.</i> 498 So. 2d 888 (Fla. 1986)	4
<i>Jackson v. State</i> , 926 So.2d 1262 (Fla. 2006), cert. denied, 549 U.S. 841, 127 S.Ct. 194, 166 L.Ed.2d 159 (2006) ..	7
<i>Lee v. State</i> , 138 So. 3d 467 (Fla. 5th DCA 2014)	2
<i>Lee v. State</i> , 117 So. 3d 848 (Fla. 5th DCA 2013)	1
<i>Lee v. State</i> , 89 So. 2d 290 (Fla. 5th DCA 2012)	1
<i>Plucinik v. State</i> , 885 So. 2d 478 (Fla. 5th DCA 2004)	5
<i>Reaves v. State</i> , 485 So. 2d 829 (Fla. 1986)	4
<i>Thompson v. Singletary</i> , 659 So. 2d 435 (Fla. 4th DCA 1995)	5
<i>Walton v. State</i> , 808 So. 2d 1292 (Fla. 3d DCA 2002)	5
<i>Washington v. State</i> , 110 So. 259 (1926)	5

OTHER AUTHORITIES:

Fla.R.App.P. 9.030(a)(2)(A)(iv)	4
---------------------------------------	---

Art. V, § 3(b), Fla. Const.	7
Art. V, §3(b)(3), Fla. Const.	4

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of robbery with a firearm and aggravated battery with a firearm and sentenced to twenty years on each count concurrent under the 10-20-Life statute. The sole issue on direct appeal to the Florida Fifth District Court of Appeal was whether the trial court used the wrong legal standard in denying Petitioner's motion for new trial. Because it was unclear from the record and the State so acknowledged, a new hearing on the motion for new trial was ordered by opinion dated June 1, 2012. *Lee v. State*, 89 So. 3d 290 (Fla. 5th DCA 2012). The body of the opinion discussed the legal standard to be used when ruling on a motion for new trial and that the standard used in the instant case was unclear. The last sentence of the opinion ordered, "we reverse the judgment and sentence and remand to the trial court for a new hearing on the motion for new trial." *Id.* Mandate was issued on June 25, 2012. (See 5D11-2319)

Over a year later on July 9, 2013, the Florida Fifth District Court of Appeal *sua sponte* withdrew the June 1, 2012, opinion and issued a clarified opinion which was identical to the 2012 opinion with the exception of the last sentence which now ordered, "we reverse the order denying the motion for new trial and remand to the trial court for a new hearing on the

motion for new trial." *Lee v. State*, 117 So. 3d 848 (Fla. 5th DCA 2013). Mandate was issued on August 19, 2013.

A hearing took place in the lower court on Petitioner's motion for new trial on September 27, 2013, after an amended motion was filed and Petitioner had returned from federal custody. The amended motion for new trial was denied on October 10, 2013. Petitioner appealed to the Florida Fifth District Court of Appeal and counsel for Petitioner filed an *Anders*¹ brief unable to argue any reversible error. The district court *per curiam* affirmed on May 13, 2014. *Lee v. State*, 138 So. 3d 467 (Fla. 5th DCA 2014). Mandate was issued on June 6, 2014. (See 5D13-3819).

Belated discretionary review was granted by this Court on October 20, 2014. (See SC14-1073) This jurisdictional brief follows.

¹*Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate that the Fifth District Court of Appeal has rendered a decision which expressly and directly conflicts with a decision of another district court, this Court, or the United States Supreme Court. In any regard, the issue is moot in light of the lower court order denying Petitioner's Amended Motion For New Trial.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSELY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Under Article V, Section 3(b)(3), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court or of the Supreme Court on the same question of law. In *Reaves v. State*, 485 So.2d 829 (Fla. 1986), this Court said that the conflict between decisions must be express and direct, i.e. it must appear within the four corners of the majority decision. Jurisdiction depends upon whether the conflict between decisions is express and direct and not inherent or implied. *Dept. of HRS v. Nat'l Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986). Applying these standards, this Court should decline to exercise jurisdiction in the instant case.

Petitioner argues that the district court's clarified opinion was issued outside of the term that the original June 1, 2012, opinion was issued and relies on *Brugmann v. State*, 37 Fla. L. Weekly D1041 (Fla. 3d DCA April 27, 2012). (Petitioner's jurisdictional brief, pg. 5) That particular opinion was withdrawn in *Brugmann v. State*, 117 So. 3d 39 (Fla.

3d DCA 2013). It is not in express and direct conflict with the instant opinion issued by the Fifth District Court of Appeal. The appellate court opinion below did not address the issue of the mandate being recalled at all, therefore, there is no conflict. There is nothing within the four corners of the opinion that is in express and direct conflict. Petitioner's issue lies *outside* the opinion, therefore, there is no conflict upon which this Court can exercise its jurisdiction.

Respondents do acknowledge that the general rule is that a motion to withdraw mandate may be granted only during the term in which it is issued. *Plucinik v. State*, 885 So. 2d 478 (Fla. 5th DCA 2004). However, it is clear in the instant case, that the Fifth District Court of Appeal was merely correcting an inadvertent clerical error. See *Walton v. State*, 808 So. 2d 1292 (Fla. 3d DCA 2002); *Thompson v. Singletary*, 659 So. 2d 435, 437 (Fla. 4th DCA 1995) (citing *Washington v. State*, 110 So. 259, 260-61 (1926)) (prevailing rule is that an appellate court's jurisdiction ends with the term the judgment was rendered and mandate issued except as to the power to make correction of clerical errors or inadvertences or to recall a mandate sent down by inadvertence, or to vacate a judgment void on its face). It was clear in the body of the opinion in the instant case that the judgments and sentences were not being reversed, but only the order denying the motion for new trial. It was never argued

that the judgments and sentences should be reversed. Petitioner is attempting to circumvent his entire conviction as a result of the court's oversight.

In addition, the issue has been rendered moot and Petitioner is attempting to do nothing more than obtain another appeal in the hopes of a different outcome. Before this Court granted belated appeal, the lower court had already denied Petitioner's Amended Motion For New Trial on October 10, 2013, Petitioner appealed and the appeal was *per curiam* affirmed on May 13, 2014. It should be noted that Petitioner's Petition For Belated Discretionary Review was provided to prison officials for mailing on May 23, 2014, and the opinion from the Fifth District Court of Appeal was dated May 13, 2014. Even in the Petition for Belated Discretionary Review, Petitioner admits he became aware of the Fifth's July 9, 2013 decision on August 12, 2013. (See SC14-1073 Petition, pg. 4) Clearly, Petitioner is attempting to get another bite of the apple *after* he did not obtain the desired results when his case was remanded back to the trial court the first time around. Even if the original mandate is enforced, there is nothing left to do since his Amended Motion For New Trial has already been denied and affirmed. He certainly is not entitled to be released or entitled to a new trial.

Petitioner has not argued any basis upon which this Court may exercise its discretionary jurisdiction. In *Jackson v. State*, 926 So.2d 1262 (Fla. 2006), cert. denied, 549 U.S. 841, 127 S.Ct. 194, 166 L.Ed.2d 159 (2006), this Court reiterated its long held view that Article V, Section 3(b) never intended that the district courts of appeal be intermediate courts and that Supreme Court discretionary review jurisdiction is properly limited to a very narrow class of cases enumerated under that constitutional provision. This Court should decline to exercise its discretionary jurisdiction.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this Court to decline to exercise its discretionary jurisdiction of this case.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

Robin A. Compton
ROBIN A. COMPTON
Assistant Attorney General
FL Bar No. 0846864

Wesley Heidt
WESLEY HEIDT
Assistant Attorney General
FL Bar No. 0773026
444 Seabreeze Boulevard
Suite 500
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 Fax

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief On Jurisdiction and Appendix has been furnished by U.S. Mail to Joe Lee, DOC# V11647, Suwannee Correctional Institution Annex, 5964 U.S. Highway 90, Live Oak, FL, 32060, this 15th day of December, 2014.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and type of font used in this brief is 12-point Courier New, in compliance with Fla.R.App.P. 9.210(a)(2).

Robin A. Compton

Robin A. Compton
Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOE LEE,
Petitioner,

v. Case No. SC14-2006
5D11-2319

STATE OF FLORIDA,
Respondent.

_____/

APPENDIX

Lee v. State,
117 So. 3d 848 (Fla. 5th DCA 2013).

Lee v. State,
89 So. 3d 290 (Fla. 5th DCA 2012).

PAMELA JO BONDI
ATTORNEY GENERAL

ROBIN A. COMPTON
Assistant Attorney General
FL Bar No. 0846864
CrimAppDAB@myfloridalegal.com

WESLEY HEIDT
Assistant Attorney General
FL Bar No. 0773026
444 Seabreeze Boulevard
Suite 500
Daytona Beach, FL 32118
(386) 238-4990
(386) 238-4997 Fax

COUNSEL FOR RESPONDENT

89 So.3d 290, 37 Fla. L. Weekly D1303
(Cite as: 89 So.3d 290)



District Court of Appeal of Florida,
Fifth District.
Joe LEE, Appellant,
v.
STATE of Florida, Appellee.

No. 5D11-2319.
June 1, 2012.

Background: Defendant was convicted in the Circuit Court, St. Johns County, Wendy Berger, J., of robbery with firearm and aggravated battery with firearm, and his motion for new trial was denied. Defendant appealed.

Holding: The District Court of Appeal, Monaco, J., held that, on motion for new trial based on claim that principal testimony was fatally inconsistent, trial court was required to consider whether evidence was technically sufficient to prove charges and whether weight of evidence support guilty verdicts.

Reversed and remanded.

*290 Ryan Thomas Truskoski, and Jeffrey Deen, of Office of the Criminal and Civil Regional Counsel, Casselberry, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

MONACO, J.

The appellant, Joe Lee, was convicted of robbery with a firearm and aggravated battery with a firearm, and sentenced on each count in accordance with the 10-20-Life statute. He argues that the trial court used an incorrect standard in ruling on his motion for a new trial founded on *291 his claim that the principal testimony against him at trial was fatally inconsistent. Because there is merit to Mr. Lee's argument, we reverse and remand for a new

hearing on his motion for new trial.

Rule 3.600(a)(2), Florida Rules of Criminal Procedure, provides that the court shall grant a new trial if, among other reasons, "[t]he verdict is contrary to law or the weight of the evidence." When ruling on a motion for new trial based on a claim that the verdict is against the weight of the evidence, the trial court is compelled to exercise its discretion to determine "whether a greater amount of *credible* evidence supports one side of an issue or the other." *Fulwood v. State*, 29 So.3d 425 (Fla. 5th DCA 2010) (citing *Geibel v. State*, 817 So.2d 1042, 1044 (Fla. 2d DCA 2002)). The trial court under these circumstances acts as a "safety valve" by considering whether to grant a new trial where "the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict." *Moore v. State*, 800 So.2d 747, 749 (Fla. 5th DCA 2001).

In the present case it is unclear whether or not the trial judge applied the correct standard in denying the motion for new trial. Indeed, the State agrees that because the record on the issue is ambiguous, a new hearing on Mr. Lee's motion is appropriate. We agree and commend the State for its candor.

Accordingly, we reverse the judgment and sentence and remand to the trial court for a new hearing on the motion for new trial.

REVERSED and REMANDED with instructions.

PALMER and LAWSON, JJ., concur.

Fla.App. 5 Dist., 2012.
Lee v. State
89 So.3d 290, 37 Fla. L. Weekly D1303

END OF DOCUMENT



117 So.3d 848, 38 Fla. L. Weekly D1521
(Cite as: 117 So.3d 848)

H

District Court of Appeal of Florida,
Fifth District.
Joe LEE, Appellant,
v.
STATE of Florida, Appellee.

No. 5D11-2319.
July 9, 2013.

Background: Defendant was convicted in the Circuit Court, St. Johns County, Wendy Berger, J., of robbery with firearm and aggravated battery with firearm, and his motion for new trial challenging the weight of the evidence was denied. Defendant appealed.

Holding: On grant of clarification, the District Court of Appeal held that remand for new hearing on motion for new trial was required due to ambiguity as to whether the trial court applied the correct legal standard.

Reversed and remanded with instructions.

Opinion, 89 So.3d 290, withdrawn and superseded.

West Headnotes

[1] Criminal Law 110 ⚡935(1)

110 Criminal Law

110XXI Motions for New Trial

110k935 Verdict Contrary to Evidence

110k935(1) k. Weight and sufficiency of evidence in general. Most Cited Cases

When ruling on a motion for new trial based on a claim that the verdict is against the weight of the evidence, the trial court is compelled to exercise its discretion to determine whether a greater amount of credible evidence supports one side of an issue or the other. West's F.S.A. RCrP Rule 3.600(a)(2).

[2] Criminal Law 110 ⚡935(1)

110 Criminal Law

110XXI Motions for New Trial

110k935 Verdict Contrary to Evidence

110k935(1) k. Weight and sufficiency of evidence in general. Most Cited Cases

On a motion for new trial based on a claim that the guilty verdict was against the weight of the evidence, the trial court acts as a "safety valve" by considering whether to grant a new trial where the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict. West's F.S.A. RCrP Rule 3.600(a)(2).

[3] Criminal Law 110 ⚡1181.5(3.1)

110 Criminal Law

110XXIV Review

110XXIV(U) Determination and Disposition of Cause

110k1181.5 Remand in General; Vacation

110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters

110k1181.5(3.1) k. In general. Most Cited Cases

Remand for a new hearing on defendant's motion for new trial challenging the weight of the evidence was required, where the record on appeal was ambiguous as to whether the trial court applied the correct standard in denying the motion. West's F.S.A. RCrP Rule 3.600(a)(2).

***849** Ryan Thomas Truskoski, and Jeffrey Deen, of Office of the Criminal and Civil Regional Counsel, Casselberry, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

CLARIFIED OPINION
PER CURIAM.

117 So.3d 848, 38 Fla. L. Weekly D1521
(Cite as: 117 So.3d 848)

The court, sua sponte, withdraws the opinion previously entered in this matter and substitutes this opinion.

The appellant, Joe Lee, was convicted of robbery with a firearm and aggravated battery with a firearm, and sentenced on each count in accordance with the 10–20–Life statute. He argues that the trial court used an incorrect standard in ruling on his motion for a new trial founded on his claim that the principal testimony against him at trial was fatally inconsistent. Because there is merit to Mr. Lee's argument, we reverse and remand for a new hearing on his motion for new trial.

[1][2] Rule 3.600(a)(2), Florida Rules of Criminal Procedure, provides that the court shall grant a new trial if, among other reasons, “[t]he verdict is contrary to law or the weight of the evidence.” When ruling on a motion for new trial based on a claim that the verdict is against the weight of the evidence, the trial court is compelled to exercise its discretion to determine “whether a greater amount of *credible* evidence supports one side of an issue or the other.” *Fulword v. State*, 29 So.3d 425 (Fla. 5th DCA 2010) (citing *Geibel v. State*, 817 So.2d 1042, 1044 (Fla. 2d DCA 2002)). The trial court under these circumstances acts as a “safety valve” by considering *850 whether to grant a new trial where “the evidence is technically sufficient to prove the criminal charge but the weight of the evidence does not appear to support the jury verdict.” *Moore v. State*, 800 So.2d 747, 749 (Fla. 5th DCA 2001).

[3] In the present case it is unclear whether or not the trial judge applied the correct standard in denying the motion for new trial. Indeed, the State agrees that because the record on the issue is ambiguous, a new hearing on Mr. Lee's motion is appropriate. We agree and commend the State for its candor.

Accordingly, we reverse the order denying the motion for new trial and remand to the trial court for a new hearing on the motion for new trial.

REVERSED and REMANDED with instructions.

SAWAYA, PALMER and LAWSON, JJ., concur.

Fla.App. 5 Dist., 2013.

Lee v. State

117 So.3d 848, 38 Fla. L. Weekly D1521

END OF DOCUMENT