

IN THE SUPREME COURT OF FLORIDA

HARRY L. HENDERSON,

Petitioner,

Case No. SC14-2007

v.

STATE OF FLORIDA,

Respondent.

_____ /

JURISDICTIONAL BRIEF OF RESPONDENT

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RECEIVED, 01/26/2015 11:08:38 AM, Clerk, Supreme Court

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PRELIMINARY STATEMENT

Respondent, State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Harry Henderson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name. "PJB" will designate Petitioner's Jurisdictional Brief, followed by any appropriate page number.

STATEMENT OF THE CASE AND FACTS

According to Petitioner's Jurisdictional Brief, he was convicted of possession of a firearm by a convicted felon, fleeing to elude and driving while license was suspended or revoked. On appeal, he argued that there was no probable cause for the stop absent a valid warrant and that, because Deputy Floyd, the testifying officer who initiated the stop, testified to what a U.S. Marshall told him, the fellow officer rule could not be applied.

The First District Court agreed with the arguments of Petitioner, and rejected the State's argument that the stop was justified by the fellow officer rule. It also rejected the State's argument that the arrest warrant issued five hours later justified the stop. However, the First District Court of Appeal

affirmed Petitioner's convictions based on the fact that he was charged and convicted of fleeing and attempting to elude. The District Court found that Petitioner's act of continuing to drive for nearly two miles after lights and sirens were activated provided probable cause for the officer to stop him for violating the statute making it illegal to flee or attempt to elude a law enforcement officer.

SUMMARY OF ARGUMENT

Petitioner's jurisdictional brief improperly relies upon facts and argument outside the "four corners" of the district court's decision. An examination of the operative facts and principles of law, as contained in the "four corners" of the DCA's decision, reveals no express and direct conflict or any other constitutional basis for this Court to exercise its jurisdiction. Therefore, jurisdiction should be declined.

ARGUMENT

ISSUE I

HAS PETITIONER SHOWN A BASIS FOR THIS COURT
TO EXERCISE ITS DISCRETIONARY JURISDICTION?
(Restated)

Appellate Standard of Review and Jurisdictional Criteria

The applicable standard of review for claims of direct and express conflict is *de novo* subject to the following criteria.

Petitioner contends that this Court has jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), which parallels Article V, § 3(b)(3), Fla. Const. The constitution provides: The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

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). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986) (rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction.

Reaves, supra; 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).

In addition, it is the "conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

In the case at bar, the First District Court of Appeal issued an Opinion. Henderson v. State, 88 So. 3d 1060 (Fla. 1st DCA 2012). In that opinion, the First District found that, when the officers attempted to pull Henderson over with lights and sirens activated, his action of continuing to drive for nearly

two miles provided probable cause to stop him for violating the statute making it illegal to flee or attempt to elude a police officer.

The Court found that the fellow officer rule in Henderson's case was not applicable to justify his stop because there was no evidence of the U.S. Marshall's grounds for suspecting that Henderson had been involved in a homicide. As a result, there was nothing in the record to impute to the deputy who initiated the stop based on the U.S. Marshall's request. The Court also found that the arrest warrant issued five hours after the stop of Henderson did not justify the stop either. As a result, had Henderson pulled over immediately after the officer activated his lights and sirens, there would have been insufficient evidence in the record to justify the stop.

There is nothing in the First District's Opinion that conflicts with Cunningham v. State, 884 So. 2d 1121 (Fla. 2nd DCA 2004) or with any other district cases or Florida Supreme Court cases. Cunningham v. State did not address a situation such as this one where Petitioner was charged and convicted of fleeing and attempting to elude because he failed to stop when an officer activated his lights and sirens. The Cunningham Court properly found that the deputy had no reasonable suspicion to justify making an investigatory stop of Cunningham's vehicle.

In Henderson v. State, the First District came to the same conclusion about the probable cause to stop Henderson's vehicle. The difference was in how Henderson and Cunningham reacted. Henderson made a decision to flee and attempt to elude. Cunningham did not. As a result, there is no express and direct conflict between the two cases. Because there is no expressed and direct conflict, this Court must dismiss this case for lack of jurisdiction.

CONCLUSION

There is no constitutional basis for discretionary jurisdiction. The petition should be denied.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Harry Lewis Henderson, DC# J05680, Century Correctional Institution, 400 Tedder Road, Century, Florida 32535, by MAIL on January 26, 2015.

Respectfully submitted and served,

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/s/ Trisha Meggs Pate

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

/s/ Jennifer J. Moore

Jennifer J. Moore
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

HARRY L. HENDERSON

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APPENDIX

APPENDIX

DOCUMENT

A Henderson v. State, 88 So. 3d 1060 (Fla. 1st DCA 2012)

88 So.3d 1060, 37 Fla. L. Weekly D1308
(Cite as: 88 So.3d 1060)

H

District Court of Appeal of Florida,
First District.
Harry HENDERSON, Appellant,
v.
STATE of Florida, Appellee.

No. 1D11-0863.
June 1, 2012.

Background: Defendant was convicted in the Circuit Court, Duval County, Mallory Cooper, J., of possession of a firearm by a convicted felon, fleeing or attempting to elude a police officer, and driving while license suspended, and he appealed.

Holding: The District Court of Appeal held that, when the officers attempted to pull defendant over with lights and sirens activated, defendant's action of continuing to drive for nearly two miles provided probable cause to stop defendant for violating statute making it illegal to flee or attempt to elude police officer.

Affirmed.

Benton, C.J., concurred in result.

West Headnotes

[1] Arrest 35 ⚔ 63.4(11)

35 Arrest
35II On Criminal Charges
35k63 Officers and Assistants, Arrest Without Warrant
35k63.4 Probable or Reasonable Cause
35k63.4(7) Information from Others
35k63.4(11) k. Other officers or official information. Most Cited Cases

Fellow-officer rule was not applicable so as to justify stop of defendant because there was no evidence of the U.S. Marshall's grounds for suspecting

that defendant had been involved in a homicide and, thus, there was nothing on the record to impute to deputy, who initiated the stop based on the U.S. Marshall's request.

[2] Arrest 35 ⚔ 60.2(11)

35 Arrest
35II On Criminal Charges
35k60.2 Investigatory Stop or Stop and Frisk
35k60.2(6) Grounds for Stop or Investigation
35k60.2(11) k. After-acquired information. Most Cited Cases

Arrest warrant issued five hours after stop of defendant did not justify the stop, absent any evidence of the information that was provided to the judge who issued the warrant and when the information was provided. U.S.C.A. Const.Amend. 4.

[3] Arrest 35 ⚔ 60.3(2)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(2) k. Particular cases. Most Cited Cases

Deputy's stated reason for the stop had no bearing on whether there was probable cause for the stop.

[4] Arrest 35 ⚔ 60.3(2)

35 Arrest
35II On Criminal Charges
35k60.3 Motor Vehicle Stops
35k60.3(2) k. Particular cases. Most Cited Cases

When the officers attempted to pull defendant over with lights and sirens activated, defendant's action of continuing to drive for nearly two miles provided probable cause to stop defendant for violating statute making it illegal to flee or attempt to elude police officer. West's F.S.A. § 316.1935(2).

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[5] Weapons 406 ⚡247

406 Weapons

406V Prosecution

406V(C) Presumptions and Burden of Proof

406k243 Possession, Use, Carrying

406k247 k. Possession after conviction
of crime. Most Cited Cases

Weapons 406 ⚡249

406 Weapons

406V Prosecution

406V(C) Presumptions and Burden of Proof

406k243 Possession, Use, Carrying

406k249 k. Intent, knowledge, purpose.
Most Cited Cases

Because defendant was the sole occupant and driver of the car when apprehended, he had exclusive possession of it, regardless of the vehicle's ownership, and thus, his knowledge of the contraband and his ability to maintain control of it was inferred in prosecution of defendant for being felon in possession of a firearm.

[6] Weapons 406 ⚡307

406 Weapons

406V Prosecution

406V(F) Questions for Jury

406k303 Possession, Use, Carrying

406k307 k. Possession after conviction
of crime. Most Cited Cases

Defendant's evidence that the automobile was a rental car leased by a friend and used by several other people did not require a judgment of acquittal on the charge of felon in possession of a firearm; but, rather, simply presented a jury question regarding whether the possession was exclusive.

*1061 Nancy A. Daniels, Public Defender, M.J. Lord, Assistant Public Defender, and Daniel Cauley, Legal Intern, Office of the Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Jennifer Moore, Assistant Attorney General, Office of the

Attorney General, Tallahassee, for Appellee.

PER CURIAM.

Harry L. Henderson appeals his convictions for possession of a firearm by a convicted felon, fleeing or attempting to elude a police officer, and driving while license suspended. He contends the trial court erred by (1) denying his motion to suppress because the arresting officer did not have reasonable suspicion or probable cause to stop his vehicle pursuant to the fellow-officer rule, and (2) denying his motion for judgment of acquittal because the state failed to prove he was in constructive possession of the firearm. We affirm.

Jacksonville Sheriff's Office Deputy J.E. Floyd testified that on June 24, 2010, a U.S. Marshall requested assistance over the police radio from available patrol units to stop an armed homicide suspect who was driving in front of him on Interstate 95 in a gold Kia with an Ohio tag. Deputy *1062 Floyd caught up with them and the Marshall pointed to the gold Kia as containing the suspect. Deputy Floyd activated his red and blue lights, as did Deputy Wilke, who was by then in front of Deputy Floyd. Deputy Wilke's SUV had Jacksonville Sheriff's Office insignia on it, "prominent and easily determined," as did Dep. Floyd's patrol vehicle. Deputy Floyd could also see lights and hear sirens behind him.

When the lights and sirens commenced, appellant slowed, as if to pull off on the grass shoulder, but then continued to drive for one to two miles, although he could have pulled over on the shoulder during that time. Appellant did not speed or violate any traffic laws before he pulled over, but he did not stop until there were officers approaching from the opposite direction. A loaded .45-caliber handgun was found under the driver's seat.

Deputy Floyd testified that he initiated the stop based on the U.S. Marshall's request. The U.S. Marshall did not testify. The deputy said he was given a teletype at around 3:00 p.m. when he booked appel-

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lant into jail stating that a warrant for appellant's arrest had been issued in St. John's County.

[1] We reject the state's argument that the stop was justified by the fellow-officer rule. The rule cannot be applied under the facts of this case. Because there is no record evidence of the U.S. Marshall's grounds for suspecting that appellant had been involved in a homicide, "there is nothing on the record to impute" to Deputy Lloyd. *J.P. v. State*, 855 So.2d 1262, 1265 (Fla. 4th DCA 2003). *Accord C.H.C. v. State*, 988 So.2d 1145 (Fla. 2d DCA 2008).

[2] We also reject the state's claim that the arrest warrant issued five hours later justified the stop, absent any record evidence of the information that was provided to the judge who issued the warrant and when the information was provided. *See, e.g., Mills v. State*, 58 So.3d 936 (Fla. 2d DCA 2011) (facts discovered after an arrest cannot be used retroactively to justify a warrantless arrest).

We affirm the order, however, because appellant's act of fleeing or attempting to elude Deputy Floyd and the other officers ^{FN1} obviates the necessity of determining whether there was reasonable suspicion or probable cause for the initial attempt to stop.^{FN2}

FN1. Section 316.1935(2), Florida Statutes (2010), provides: "Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony of the third degree[.]"

FN2. Although the prosecutor mainly argued below that the fellow-officer rule should defeat defendant's motion to suppress, he did briefly raise an argument regarding defendant's flight once the officer's lights and siren were activated.

In a case much like that at bar, *Green v. State*, 530 So.2d 480 (Fla. 5th DCA 1988) (on motion for rehearing en banc), the defendant drove through a driver's license checkpoint that was later shown to be unlawful because it did not meet constitutional standards. The defendant was stopped after a brief pursuit and cocaine was found in his car. The Fifth District affirmed the denial of a motion to suppress, finding that the stop was valid under section 316.1935, Florida Statutes, because the police stopped and searched him based on his flight rather than at the illegal checkpoint. *Accord State v. McCune*, 772 So.2d 596, 597 (Fla. 5th DCA 2000) (reversing the order granting the defendant's motion to suppress, because, *1063 "regardless of the legality of the initial stop (or attempted stop), the statutory offense of fleeing and eluding does not require the lawfulness of the police action as an element of the offense.").

Appellant relies instead upon *Ray v. State*, 40 So.3d 95 (Fla. 4th DCA 2010), in which the Fourth District reversed the denial of the defendant's motion to suppress, finding there was no reasonable suspicion for the traffic stop. A police officer responding to a complaint about drug dealing witnessed a hand-to-hand exchange between the defendant and another person. Believing this was a drug sale, the officer followed the defendant in her patrol car and activated the lights to make a stop. The defendant drove through a stop sign and then pulled over, dropping cocaine out the window. The Fourth District concluded that the initial hand-to-hand exchange did not by itself provide reasonable suspicion for the stop; hence, the officer had activated her emergency lights without reasonable suspicion. In addition, the defendant's traffic infraction of running the stop sign did not provide a reason for the stop because it occurred after the lights were activated.

[3][4] *Ray* is distinguishable, because the court did not characterize the defendant's brief act of running the stop sign before pulling over as flight, and there was no charge of fleeing or attempting to

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(Cite as: 88 So.3d 1060)

elude. In our case, when the officers attempted to pull appellant over with lights and sirens activated, appellant continued to drive for nearly two miles, providing probable cause to stop him for violating section 316.1935(2). Deputy Floyd's stated reason for the stop has no bearing on whether there was probable cause for the stop. *See Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *State v. Moore*, 791 So.2d 1246 (Fla. 1st DCA 2001).

Our decision is also supported by recent case law addressing the lawfulness of a stop based upon a defendant's unprovoked flight. In *C.E.L. v. State*, 24 So.3d 1181 (Fla.2009), the Florida Supreme Court affirmed a conviction for resisting an officer without violence, finding that even if the officer initially lacked reasonable suspicion to stop the defendant, reasonable suspicion was established by the defendant's flight, citing *Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). In *Wardlow*, the Court acknowledged that merely standing around in a high-crime area does not provide reasonable suspicion, but that the defendant's "unprovoked" flight did. "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 124, 120 S.Ct. 673. Our supreme court concluded in *C.E.L.* that the defendant's flight in a high-crime area provided reasonable suspicion to justify an investigative stop, and that his "continued flight in knowing defiance of the officer's lawful order to stop" constituted resisting an officer without violence. *C.E.L.*, 24 So.3d at 1189. *Accord Williams v. State*, 55 So.3d 596 (Fla. 3d DCA 2010); *Livingston v. State*, 985 So.2d 1144 (Fla. 5th DCA 2008).

In the case at bar, had appellant pulled over immediately after Dep. Floyd activated his lights and siren, there would have been insufficient evidence in the record to justify the stop. When appellant continued driving, however, long after the officers had activated their lights and sirens, in combination with the request from the Marshall to assist in stop-

ping a homicide suspect and the Marshall's signal that the gold Kia contained the suspect, Deputy Floyd did have a reasonable suspicion that a crime had been or was being committed sufficient to warrant the stop.

*1064 [5][6] As to the second issue, appellant fails to show that the trial court erred as a matter of law by denying his motion for judgment of acquittal on the charge of felon in possession of a firearm. Because appellant was the sole occupant and driver of the car when apprehended, he had exclusive possession of it, regardless of the vehicle's ownership, and thus his knowledge of the contraband and his ability to maintain control of it was inferred. *See Sinclair v. State*, 50 So.3d 1223 (Fla. 4th DCA 2011); *Lee v. State*, 835 So.2d 1177 (Fla. 4th DCA 2002); *State v. Odom*, 862 So.2d 56 (Fla. 2d DCA 2003). Appellant's evidence that the automobile was a rental car leased by a friend and used by several other people did not require a judgment of acquittal but simply presented a jury question regarding whether the possession was exclusive. *Odom*, 862 So.2d at 59.

AFFIRMED.

PADOVANO and SWANSON, JJ., concur.
BENTON, C.J., concurs in result.

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