IN THE SUPREME COURT OF FLORIDA

WILLIE F. VAUSE,

PETITIONER,

-VS-

CASE NO. 63,10

STATE OF FLORIDA,

RESPONDENT.

RESPONDENT'S JURISDICTIONAL BRIEF

JIM SMITH
ATTORNEY GENERAL

JOHN W. TIEDEMANN
ASSISTANT ATTORNEY GENERAL
1502 THE CAPITOL
TALLAHASSEE, FL 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

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RESPONDENT'S JURISDICTIONAL BRIEF

PRELIMINARY STATEMENT

Willie F. Vause, the criminal defendant and appellant below in Vause v. State, ___ So.2d ___ (Fla.1st DCA 1982), 7 F.L.W. 2595, and the petitioner here, will be referred to as "Vause." The State of Florida, the prosecuting authority and appellee below and the respondent here, will be referred to as "the State." For the sake of clarity, the Court may wish to note that the State has filed its own petition for writ of certiorari to review two sentencing dispositions in the decision below (see Petitioner's Brief on Jurisdiction, State v. Vause, Case No. _____, First DCA Case NO. AB-460, filed February 16, 1983). These particular sentencing dispositions are not placed in issue by the instant petition, and the State will make every effort to keep the two petitions for writ of certiorari as distinct as possible.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the jurisdictional question raised here may be summarized as follows:

Vause was convicted in the trial court of third degree murder, shooting into an occupied vehicle,and using a firearm in the commission of a felony. He received separate sentences on all three counts, including a sentence of twelve years' imprisonment for third degree murder. He also received a mandatory minimum three-year sentence under §775.087(2)(a) for having a firearm in his possession while committing a crime listed in that statute. On appeal, the First District, on December 8, 1982, reversed Vause's sentences for shooting into an occupied vehicle and using a firearm in the commission of a felony, but affirmed his mandatory minimum three-year sentence under §775.087(2) because he had used a firearm to commit the third degree murder. The court also affirmed the trial court's decision that Dr. Beeckler, a radiologist, was competent to testify that in his opinion, judging from autopsy X-rays, the fatal bullet fired by Vause had entered the victim's body intact and had then fragmented upon hitting the victim's ribs.

Vause moved for a rehearing, citing both the Court's affirmance of the competency of Dr. Beeckler to testify and the imposition of the mandatory minimum three-year sentence as error. He also moved for a rehearing en banc on the latter basis. These motions were denied on January 12, 1983. On January 24, the First District granted Vause's motion for stay of mandate pending the outcome of the instant proceeding. Notice to invoke this Court's discretionary jurisdiction had been timely filed on January 20.

STATEMENT OF JURISDICTION

Vause seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3), Florida Constitution, and Fla.R.App.P. 9.030(a)(2)(A)(iv) on the basis that the decision below expressly and directly conflicts with a decision of the Third District on one question of law and with a decision of this Court on a second question of law. Article V, Section 3(b)(3) provides in pertinent part that this Court jurisdictionally:

> May 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.

Fla.R.App.P. 9.030(a)(2)(A)(iv) provides in pertinent part that:

> The discretionary jurisdiction of the Supreme Court may be sought to review * * * decisions of district courts of appeal that * * * expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law.

In Jenkins v. State, 385 So.2d 1359 (Fla.1980), this Court defined the limited parameters of conflict review under these provisions as follows:

> This Court may only 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. The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabr.).

See generally Ansin v. Thurston, 101 So.2d 808 (Fla.1958); Withlacoochee River Elec. Coop. v. Tampa Elec. Co., 158 So.2d 136 (Fla. 1963), cert.denied, 377 U.S. 952 (1964), and England and Williams,

Florida Appellate Reform One Year Later, 9 FSU L. Rev. 221 (1981). The State contends that insofar as the decision below does not expressly and directly conflict with other decisions of Florida Courts in the manner claimed by Vause, this Court is without jurisdiction over these claims in this cause.

ISSUES PRESENTED

ISSUE I

THE DECISION OF THE DISTRICT COURT THAT DR. BEECKLER, A RADIOLOGIST, WAS COMPETENT TO TESTIFY THAT IN HIS OPINION, JUDGING FROM AUTOPSY X-RAYS, THE FATAL BULLET FIRED BY VAUSE HAD ENTERED THE VICTIM'S BODY INTACT AND HAD THEN FRAGMENTED UPON HITTING THE VICTIM'S RIBS, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF SALINETRO V. NYSTROM, 341 So.2d 1059 (FLA.3rd DCA 1977) ON THE SAME QUESTION OF LAW.

ISSUE II

THE DECISION OF THE DISTRICT COURT AFFIRMING VAUSE'S MANDATORY MINIMUM THREE-YEAR SENTENCE UNDER §775.087(2)(a) FOR HAVING A FIREARM IN HIS POSSESSION WHILE COMMITTING A THIRD DEGREE MURDER, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. HEGSTROM, 401 So.2d 1343 (FLA.1981).

ISSUE I

THE DECISION OF THE DISTRICT COURT THAT DR. BEECKLER, A RADIOLOGIST, WAS COMPETENT TO TESTIFY THAT IN HIS OPINION, JUDGING FROM AUTOPSY X-RAYS, THE FATAL BULLET FIRED BY VAUSE HAD ENTERED THE VICTIM'S BODY INTACT AND HAD THEN FRAGMENTED UPON HITTING THE VICTIM'S RIBS, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF SALINETRO V. NYSTROM, 341 So.2d 1059 (FLA.3rd DCA 1977) ON THE SAME QUESTION OF LAW.

ARGUMENT

In Salinetro v. Nystrom, 341 So.2d 1059 (Fla.3rd DCA 1977), a civil medical malpractice case, the Third District affirmed the decision of a trial judge that a gynecologist was not competent to express an expert opinion as to whether the performance of a radiologist in taking X-rays of a pregnant woman was medically substandard. In the instant case, the First District, in a criminal case, affirmed the decision of the trial judge that a radiologist was competent to express an opinion as to whether, judging from autopsy X-rays, the fatal bullet had fragmented upon hitting the victim's ribs. Vause alleges that the two decisions expressly and directly conflict on the same question of law because the Salinetro v. Nystrom opinion states that a medical witness is not qualified to give expert testimony outside his particular field of expertise. The State would respectfully suggest that the two decisions are in two senses compatible. Both indicate that a radiologist may be competent to express an expert opinion regarding X-rays, and both stand for the unremarkable proposition

that the qualification of an expert witness is within the sound discretion of the trial court. Otherwise, the two decisions are incomparable. The fact that both incidentally involve radiology and X-rays and that the trial courts reached different conclusions regarding the competency of the physician witnesses in the cases in no way amounts to an express and direct conflict on the same question of law such as would justify certiorari review, given the obvious procedural, factual, and contextual dissimilarities of the two decisions. The fact that Vause several times impermissibly refers to the record on appeal before the First District rather than the decision proper, cf. Jenkins v. State, supra, underlines the impossibility of demonstrating a conflict.

ISSUE II

THE DECISION OF THE DISTRICT COURT AFFIRMING VAUSE'S MANDATORY MINIMUM THREE-YEAR SENTENCE UNDER §775.087(2)(a) FOR HAVING A FIREARM IN HIS POSSESSION WHILE COMMITTING A THIRD DEGREE MURDER, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN STATE V. HEGSTROM, 401 So.2d 1343 (FLA.1981).

ARGUMENT

In State v. Hegstrom, 401 So.2d 1343 (Fla.1981), this Court, in determining whether the respondent defendant could be properly convicted of and sentenced separately for both first degree felony murder and the underlying felony of robbery, espoused two primary propositions of law. First, relying upon Blockberger v. United

States, 284 U.S. 299 (1932), the Court determined that the constitutional protection against double jeopardy did not prohibit the entry of separate convictions and sentences for separate criminal offenses committed during the course of a single transaction if each offense statutorily required proof of an element which the other offense did not. Second, the court determined that §775.021(4), Fla.Stat. (1979), did not prohibit the entry of separate convictions and sentences for separate criminal offenses committed during the course of a single transaction unless, by the plain language of the statute, one offense was a "lesser included offense" of the other. Applying the propositions, the Court determined that "[b]ecause the crime of first-degree murder committed during the course of a robbery requires, by definition, proof of the predicate robbery, the latter is necessarily an offense included within the former"; consequently, the defendant could be convicted of both crimes but only sentenced for one. 401 So.2d at 1346.

If one searches State v. Hegstrom for an express and direct conflict with the decision below on the question of whether a defendant convicted of third degree murder may receive a mandatory minimum three-year sentence for using a firearm to commit the murder, one searches in vain. The two decisions are distinguishable in that State v. Hegstrom involves an interpretation of §775.021(4), which prescribes a rule of statutory construction to be employed when a defendant commits two or more substantive offenses, whereas the decision below involves an interpretation of §775.087(2)(a), which merely prescribes an enhanced penalty for the commission of certain substantive offenses rather than defining a substantive

offense in and of itself. Even if one accepts Vause's contention that the decisions are comparable--which incorrectly assumes that §775.087(2)(a) defines a substantive offense--separate sentences for third degree murder in violation of §782.04(4), Fla.Stat. (1979), and for possessing a firearm while committing a listed crime in violation of §775.087(2)(a) would in fact be proper under the State v. Hegstrom criteria, as well as under this Court's subsequent decisions of Borges v. State, 415 So.2d 1265 (Fla.1982); State v. Cantrell, 417 So.2d 260 (Fla.1982), and State v.Carpenter, 417 So.2d 986 (Fla.1982). The statutes involved read as follows:

> 782.04 Murder.--
> (4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> 775.087 Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.--
> (2) Any person who is convicted of:
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes; * * * and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. . . .

It is statutorily possible to commit a third degree murder without possessing a firearm while committing a listed crime, and vice versa[1].

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[1] For example, one may commit a third degree murder by killing someone in the course of committing a drug trafficking felony in

Thus, there is no express and direct conflict on the same question of law between the decision below and this Court's decision in State v. Hegstrom. None of Vause's arguments can change this essential fact.

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violation of Chapter 893, Fla.Stat., without possessing a firearm; and one may possess a firearm while committing an arson, and not kill anyone, and thus not commit a third degree murder.

CONCLUSION

WHEREFORE, the State submits that Vause's petition for writ of certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

JOHN W. TIEDEMANN
Assistant Attorney General
1502 The Capitol
Tallahassee, FL 32301
(904) 488-0290

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been forwarded to Mr. Philip J. Padovano, Post Office Box 873, Tallahassee, FL 32302, via U.S. Mail, this 17th day of February 1983.

John W. Tiedemann
Assistant Attorney General