IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

AZOR J. EVERTON, JR.,

Appellant/Petitioner,

vs.

MARION WILLARD, Individually and d/b/a WILLARD'S PAINTING, PINELLAS COUNTY SHERIFF'S DEPT. and PINELLAS COUNTY,

Appellees/Respondents.

and

ANTON TRINKO, etc., et al.,

Appellants/Petitioners,

vs.

MARION R. WILLARD, Individually and d/b/a WILLARD'S PAINTING, STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, PINELLAS COUNTY SHERIFF'S DEPT. and PINELLAS COUNTY,

Appellees/Respondents.

CASE NO. 63,440

SECOND DISTRICT COURT OF APPEAL
NO: 81-2081

RESPONDENT'S JURISDICTIONAL BRIEF FOR PINELLAS COUNTY SHERIFF'S DEPARTMENT

MARK E. HUNGATE, ESQUIRE and
JAMES B. THOMPSON, ESQUIRE
Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.
P. O. Box 210
St. Petersburg, Florida 33731
(813)896-0601
ATTORNEY FOR APPELLEE/RESPONDENT
PINELLAS COUNTY SHERIFF'S DEPT.

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STATEMENT OF THE CASE AND OF THE FACTS

Because the Petitioners, Azor J. Everton, Jr. and Anton Trinko, attempt to invoke this Court's jurisdiction on the grounds that the rule of law announced by the Second District in this case expressly and directly conflicts with previously announced rules of law, the most accurate and simple statement of the case and of the facts is the decision rendered by the Second District itself. Thus, for its statement of the case and of the facts, this Respondent simply adopts by reference the opinion of the Second District.

Petitioners argue to this Court that their allegations were "misconstrued" by the Second District in that the opinion addressed a deputy's failure to arrest, rather than a failure to gather facts to put him in a position to make the decision whether to invoke the criminal justice process.

As Respondent pointed out in its brief to the Second District, it is apparent that Petitioners seek some sort of de novo factual determination rather than review of a conflict of decisions of law. In attempting to isolate one factual element of a potential detainment or arrest situation, Petitioners are ignoring the sequential nature of the very duty they seek to make actionable- selective discretionary law enforcement.

Motion for rehearing was denied by Order dated

February 21, 1983 and the notice to invoke the discretionary jurisdiction of this Court was filed March 22, 1983. Petitioner's Amended Jurisdiction Brief was served by mail on April 1, 1983 and this Respondent's jurisdiction brief was served by mail on April 25, 1983.

ISSUES CONCERNING JURISDICTION

I.

THE RULE OF LAW ANNOUNCED BY THE SECOND DISTRICT IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF COMMERCIAL CARRIER CORP. v. INDIAN RIVER COUNTY, 371 So.2d 1010(FLA.1979) AND ITS PROGENY.

ARGUMENT

Petitioners seek to invoke the jurisdiction of this Court pursuant to Article V, Section 3(b)(3), Florida Constitution (1980) concerning decisions which expressly and directly conflict with decisions from another appellate court. There are only two principal situations authorizing the use of conflict jurisdiction: (1) when the decision announces a rule of law that conflicts with a rule previously announced by another appellate court; or (2) when the decision applies a rule of law to produce a different result in a case involving substantially the same controlling facts as those in a prior case decided by another appellate court. Nielson v. City of Sarasota, 117 So.2d 731(Fla.1960). Under the recent amendments to the Florida Constitution, the conflict must be "express" and contained within the written rules announced by the court. Jenkins v. State, 385 So.2d 1356(Fla.1980). For jurisdictional purposes, a conflict must exist between the actual decisions and not merely between statements of opinion or reasons contained with the decisions. Gibson v. Maloney, 231 So.2d 823(Fla.1970).

Petitioners' brief does not clearly enunciate any rule of law announced by the Second District which conflicts with earlier precedent nor does their brief explain which of the two Nielson conflicts, if either, it is asserting. Thus, it is perhaps simplest to examine the proposed "conflict" cases.

First, it should be clear that Nielson test number two is not applicable. While almost the exact same facts were presented in Evett v. City of Inverness, 224 So.2d 365(Fla.2d DCA 1969), the same result was obtained. In any case, the 1980 amendments eliminated intradistrict conflicts as a basis for asserting conflict jurisdiction. Subsequent to Commercial Carrier, similar facts have not presented the question of whether a deputy sheriff may be liable in tort for alleged negligent failure to detain or arrest an allegedly intoxicated motorists, Weissburg v. City of Miami Beach, 383 So.2d 1158 (Fla.3rd DCA 1980) notwithstanding.[1]

Petitioners are apparently suggesting that failure

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[1] Weissburg involved a situation where an off-duty policeman, being paid by a utility to direct traffic around a worksite, took a shade-break. A collision between two vehicles allegedly resulted from his absence. Dismissal of a complaint was reversed. While certainly Weissburg involves a neglect of duty by a law enforcement officer, no discretionary decisions by the officer were required, thus the facts of the two cases are not remotely similar.

to direct traffic by resting in the shade and the decision as to whether to detain and arrest an intoxicated motorist so as to determine whether to invoke the criminal justice systems are comparable functions by arguing at p.7 of their brief that every decision a police officer makes while on duty involves basic governmental policy and the implementation thereof.

Respondent takes the position that such a statement typifies their superficial treatment of the entire jurisdiction question. Certainly, a decision whether to engage in hot pursuit of a suspected fleeing felon is discretionary. Is the decision to take a coffee break or rest break discretionary? Of course not, as Weissburg held, a holding with which Respondent quarrels not.

Thus, the suggested conflict cases must be evaluated solely in terms of whether the rule announced herein of the Second District conflicts with a rule of law previously announced by another court. This question is easily answered by a quote from Petitioners' own brief at p.6. After characterizing the holding of the Second District as carving out an exception to the rule that operational activities of a governmental unit are not protected by sovereign immunity, they conclude:

> "This exception is one that has never before been suggested or recognized by any court of this state".

Respondent respectfully posits that if the Second

District did break new ground in this decision, i.e. if the decision is one of first impression, it certainly cannot, by definition, directly and expressly conflict with any previously announced rule.

Finally, Respondent suggests that the Second District's decision is entirely harmonious with Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010(Fla.1979), and any of this Court or any other appellate court's decisions.

Petitioner states at p.8 that "all of the decisions on sovereign immunity have been based upon the distinction between planning and operation type decisions" which standard evolved from this Court's approval of the language contained in Johnson v. State, 447 P.2d 352(Cal.1968), in Commercial Carrier, supra.

Respondent's argument was that because Deputy Parker's actions came within the discretionary function exception set forth in the four-pronged test of Evangelical United Brethern Church of Adna v. State, 407 P.2d 440(Cal.1965), it is immune from suit in tort.

The Second District observed that the problem with that argument is that this Court also adopted the planning/operational test set forth in Johnson v. State, supra.

In affirming the dismissal of this complaint, what the Second District simply did was determine that the Evangelical

four-pronged test was a threshhold test or preliminary test which a complaint must pass (by receiving at least one "no" answer) before proceeding onward to the Johnson v. State planning/operational distinction.

By examining the language of Evangelical and Johnson, this conclusion is inevitable. At. p. A-16, the Second District quotes the former which suggests that any determination of a line of demarcation between discretionary and other administrative processes, 'necessitates a posing of at least the following four preliminary questions'. If all are answered affirmatively, the challenged act or omission is non-tortious. If not, further inquiry may become necessary. This further inquiry incorporates the Johnson test.

At p.1022, this Court in Commercial Carrier, commended utilization of the preliminary test iterated in Evangelical United Brethern, supra.

Therefore, at most, the decision of the Second District is an extension of, but entirely consistent with, Commercial Carrier and State, D.O.T. v. Nielsen, 419 So.2d 1071(Fla.1982).

If it is apparent that the challenged act meets the four-pronged Evangelical test, no further evaluation is necessary. Therefore, because Deputy Parker exercised a discretion inherent both in the nature of enforcement and in the implementation of basic planning level activity, conflict jurisdiction is not present.[2]

[2]See also Ellmer v. City of St. Petersburg, 378 So.2d 825 (Fla.2nd DCA 1979) where the Second District held that sometimes only persons in the field can make effective plans.

II.

THE DECISION IN THIS CASE DOES NOT EXPRESSLY AFFECT A CLASS OF STATE OR CONSTITUTIONAL OFFICERS.

Though their brief is far from specific, Point II apparently asserts jurisdiction under Article 5, Section (3)(b)(3), Florida Constitution (1980) which extends discretionary jurisdiction in this Court to decisions of district court of appeal that expressly affect a class of constitutional or state officers.

First, Petitioners did not sue Gerry Coleman as Sheriff of Pinellas County, Florida. They sued the Pinellas County Sheriff's Department. The Pinellas County Sheriff's Department is not a class of state or constitutional officers. Further, the question is not whether Sec.768.28, Fla.Stat. applies to sheriffs. That issue was resolved in Hambrick v. Beard, 396 So.2d 709(Fla.1981).

As emphasized in Commercial Carrier, this case is one of many factual situations that must be examined on a case-by-case basis.

Also, indicative of the absence of an affect on a class of constitutional or state officers in this case is the recognition that the 1979 amendments to Sec.768.28(9)(a), Fla.Stat., eliminate the personal liability of any governmental officer unless he acts with punitive intent. The section further immunizes the state or its subdivisions if a governmental employee acts with such punitive intent.

This Court restricted this basis for asserting its discretionary jurisdiction in Spradley v. State, 293 So.2d 867

(Fla.1974) by holding that to invoke the provision, a decision must directly and in some way exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitution or state officers.

Obviously, there are many other law enforcement agencies which are not constitutional or state officers such as municipal police and the highway patrol, such that the decision does not exclusively affect the sheriff's duties.

Finally, Petitioners cite no authority in support of their assertion of jurisdiction under this provision.

CONCLUSION

The Second District's decision in this case merely applied the well-established law concerning sovereign immunity to the factual situation of a decision confronting a law enforcement officer as to whether to invoke the criminal justice process. No citation provided by Petitioners deals with similar facts. No other court in Florida has previously rendered any decision contrary to the Second District's decision as admitted by Petitioners.

This case does not affect a class of constitutional officers in that the named Defendant is not Gerry Coleman, as Sheriff of Pinellas County, but is the "Pinellas County Sheriff's Department"of which there is only one.

The decision of the Second District is well-reasoned. Jurisdiction should be denied in this case.

Respectfully submitted,

By: Mark E. Hungate

MARK E. HUNGATE, ESQUIRE and
JAMES B. THOMPSON, ESQUIRE
Fowler, White, Gillen, Boggs,
Villareal & Banker, P.A.
P. O. Box 210
St. Petersburg, Florida 33731
(813)896-0601
ATTORNEY FOR APPELLEE/RESPONDENT
PINELLAS COUNTY SHERIFF'S DEPT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing instrument has been furnished by United States Mail to Daniel C. Kasaris, Esquire, Yanchuck, Thompson and Young, P.A., P. O. Box 4192, St. Petersburg, Florida, 33731, Rick A. Mattson, Esquire, P. O. Box 14373, St. Petersburg, Florida 33733, Robert K. Hayden, Esquire, 800 - Court Street, Clearwater, Florida 33516 and Andrew J. Rodnite, Esquire, 315 Court Street, Clearwater, Florida 33516 this 25th day of April, 1983.

FOWLER, WHITE, GILLEN, BOGGS,
VILLAREAL & BANKER, P.A.

By: Mark E. Hungate

MARK E. HUNGATE, ESQUIRE and
JAMES B. THOMPSON, ESQUIRE
P. O. Box 210
St. Petersburg, Florida 33731
(813)896-0601
ATTORNEY FOR APPELLEE/RESPONDENT
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