IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,711

FILED

JUL 14 1983

SID J. WHITE
CLERK SUPREME COURT
By ________
Chief Deputy Clerk

NATHANIEL DEAN

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON JURISDICTION

JIM SMITH
Attorney General
Tallahassee, Florida

CAROLYN M. SNURKOWSKI
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

	PAGE
INTRODUCTION.	1
STATEMENT OF THE CASE AND FACTS..............	1
POINT ON APPEAL..............................	2
ARGUMENT.....................................	3-8
CONCLUSION.	9
CERTIFICATE OF SERVICE.......................	9

TABLE OF CITATIONS

CASES	PAGE
Crum v. State, 398 So.2d 810 (Fla. 1981)...............	6, 7
Dean v. State, ___So.2d___(decided April 5, 1983)......	3, 7
Menendez v. State, 368 So.2d 1278 (Fla. 1979)..............	7
State v. Tsavarias, 394 So.2d 418 (Fla. 1981)...............	3
Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974).......	6, 7

OTHER AUTHORITIES

Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.........	3
Rule 3.152(b), Fla.R.Crim.P..................	7
Rule 3.250, Fla.R.Crim.P.....................	8

INTRODUCTION

The petitioner, Nathaniel Dean, was the appellant in the District Court of Appeal of Florida, Third District. The respondent, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this court. The symbol "R" will be used to designate the record on appeal. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the petitioner's Statement of the Case and Facts as being a substantially true and correct account.

POINT ON APPEAL

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OTHER DISTRICT COURT WITH REGARD TO PETITIONER'S MOTION TO SUPPRESS; MOTIONS TO SEVER; AND DENIAL OF CLOSING ARGUMENT?

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN DEAN V. STATE, __SO.2D____(Opinion filed APRIL 5, 1983 HAS NOT DIRECTLY AND EXPRESSLY CONFLICTED WITH PRIOR DECISIONS BY THIS COURT OR ANY OTHER COURT OF APPEAL.

Appellant assails the decision by the Third District Court of Appeal in Dean v. State, __So.2d___(decided April 5, 1983) on three (3) grounds. He asserts that in light of Judge Ferguson's dissenting opinion express and direct conflict appears on the face of the majority opinion. Respondent would disagree and submit that petitioner has failed to demonstrate express and direct conflict pursuant to Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

A. MOTION TO SUPPRESS

Citing to State v. Tsavarias, 394 So.2d 418 (Fla. 1981), petitioner argues that the trial court's ruling in the appellate court's affirmance of said ruling directly conflicts with said opinion. Petitioner argues

> In Tsavarias, this court held that a defendant had standing to object to the seizure of documents from his office pursuant to a sub poena duces tecum which was served upon his secretary. The court noted that sub poenas duces tecum, proper ly used are different from search warrants because they are indisputably less intrusive. The

> primary reason, this court stated, is that a sub poena duces tecum is subject to a motion to quash prior to the production of the requested material."
>
> Petitioner's brief, p. 5.

The Third District Court in Dean v. State, included that there was no merit to petitioner's motion to suppress claim because first, petitioner had no standing to move to suppress the evidence; second, that the pre-trial motion to suppress was "patently defective on its face and was, therefore, subject to summary denial on that basis alone"; and third, the complaint was not preserved for appellate review.

The Third District opinion states:

> Plainly, the trial court was correct in rejecting this showing of "standing" because a corporate official can never, by virtue of office alone, derive "standing" to object to a sub poena which directs, as here, the production of corporate books and records. (cites omitted). Moreover, the defendant made no contention below and, in essence, makes no contention now that his "standing" rests on some other valid legal basis. The trial court, then, had no alternative but to deny the motion to suppress, for lack of "standing," and was not required to take testimony on the legal merits of the motion to suppress.

The court went on to hold that the motion to suppress "merely alleges in conclusory terms that "the form and manner of service of said sub poena were contrary to law, therefore the aforesaid seizure was illegal." (R-99). A ground or reasons so general and vague as to constitute no ground or reason at all, even when combined with the motions bareboned factual recital."

Lastly, the court concluded that:

> "at no time did the defendant argue with any specifity or case authority, as he does now, that his rights were violated below because the subject sub poena was unconstitutionally overbroad and was used as a ruse to conduct a general exploratory search for evidence. Based on a long and well settled line of authortity, we are precluded by law from considering the search and seizure contention raised herein as they were never clearly presented to the trial and, in essence, are urged here for the first time on appeal."

Clearly on the face of the opinion no conflict has been presented let alone direct and express conflict. Respondent would submit petitioner has failed to met his burden in satisfying the jurisdictional requirements with regard to the Third District Court's holding as to the motion to suppress filed at trial.

B. THE MOTIONS TO SEVER

Petitioner next argues that the Third District Court's opinion conflicts with this court's decision in Crum v. State, 398 So.2d 810 (Fla. 1981) and the Fourth District Court's opinion in Thomas v. State, 297 So.2d 850 (Fla. 4th DCA 1974) in that a severance should have been granted sub judice. The Third District observed:

> The defendant contends that the trial court committed reversible error in denying his motions for severance of defendant's so as to be tried separately from his co-defendant Nimrod Harmon. We can not agree. The evidence of guilt against the defendant Dean was so overwhelming that his otherwise proper joinder with the co-defendant Harmon under Fla.R.Crim. 3.150(b) could have had no real impact on the outcome of this case and, therefore, a severance of defendant's were not called for under Fla.R.Crim.P. 3.152(b). True, the co-defendant's counsel did assert the defendant Dean's guilt in the co-defendant's opening statement and closing argument to the jury, but this added little or nothing to the already powerful case against the defendant Dean, a case so strong that no real defense was every marshalled below against it. As such, we are unwilling to upset these convicts based on the subject severance issue. Menendez v. State, 368 So.2d 1278 (Fla. 1978).

Clearly, neither Crum v. State, supra, nor Thomas v. State, supra, expressly and directly conflict with the

instant cause. In Crum v. State, supra, this court acknowledged that the granting or denial of a motion for severance was within the discretion of the trial court and that in reviewing this discretionary ruling the test for the appellate court was whether the trial court abused its discretion citing to Menendez v. State, 368 So.2d 1278 (Fla. 1979). The court announced that Fla.R.Crim.P. 3.152(b) provides that a motion for severance may be made during trial if severance appears necessary to achieve a fair determination of a defendant's innocence or guilt. The bottom line so to speak, in Crum, supra, is that:

> The objective of fairly determining a defendant's innocence or guilt should have priority over other relevant considerations such as expense, effiency and convenience."

Indeed, the Third District Court in Dean v. State, supra, concluded that there was no merit to petitioner's claim because of the overwhelming evidence against petitioner as to his guilt. In Thomas v. State, supra, the Fourth District reversed based on the facts of that case and the necessary prejudice which accrued to the defendant based on those facts when the trial court denied a motion to sever therein. Clearly the facts of Thomas are distinguishable from the facts sub judice.

C. DENIAL OF CLOSING ARGUMENT

Lastly, petitioner argues that the Third District's opinion holding petitioner was not entitled to the right to make concluding arguments before the jury pursuant to Fla.R.Crim.P. 3.250 fails to satisfy the jurisdictional requirements in that petitioner cites no cases which expressly and directly conflict with the Third District's opinion. The main thrust of the Third District's ruling was that there was no closing argument made by the State and therefore no rebuttal by defense counsel was necessary. As an aside, the court noted that

> "even if we were to construe the State's waiver as oblique one sentence jury argument, the error, if any, in not allowing a reply to so fleeting a common can hardly be considered a reversible error. See Palmes v. State, 397 So.2d 648, 653-54 (Fla. 1981), petition for cert. den., 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981); Section 59.041, 924.33, Fla.Stat. (1981)."

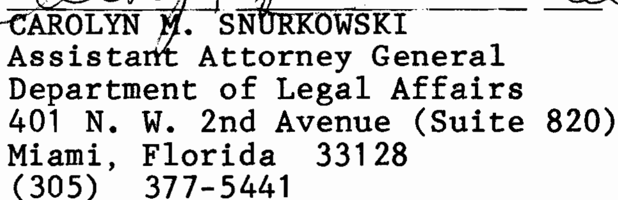
Absent demonstrable evidence that conflict expressly and directly exists sub judice, respondent would urge this court to deny petitioner's Petition for Discretionary Review.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



CAROLYN M. SNURKOWSKI
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to MICHAEL A. ROSEN, Esq., Special Assistant Public Defender, Suite 306, 1401 Brickell Avenue, Miami, Florida 33131, on this 11th day of July, 1983.

CAROLYN M. SNURKOWSKI
Assistant Attorney General

ss/