045

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,369

THE STATE OF FLORIDA,

Petitioner,

vs.

RICHARD WAYNE SHEPHERD,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON JURISDICTION

GELBER, GLASS, DURANT, CANAL
& GRANDE, P.A.
Attorneys for Respondent
1250 N.W. 7th Street
Suites 202-205
Miami, Florida 33125
(305) 326-0090

TOPICAL INDEX

LIST OF CITATIONS AND AUTHORITIES

INTRODUCTION

Petitioner was the prosecution at the trial court level and the appellee on appeal. Respondent was the defendant at the trial level and the appellant in the Third District Court of Appeal. The parties will be referred to in this brief as they appear before this Court. The symbol "A" will be used to refer to the appendix filed with petitioner's brief.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts in petitioner's brief is acceptable to the respondent.

QUESTIONS PRESENTED

I

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IS IN CONFLICT WITH THIS COURT'S DECISION IN WHITE V. STATE, 377 So.2d 1149 (Fla. 1979) AND WILSON V. STATE, _____So.2d_____, (Fla. 1983), CASE NO. 61,365; OPINION FILED JULY 21, 1983. (8 F.L.W. 265)?

II

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IS IN CONFLICT WITH THE OPINIONS IN STATE V. BOLTON, 383 So.2d 924 (Fla. 2d DCA 1980) AND GAINS V. STATE, 417 So.2d 719 (Fla. 1st DCA 1982)?

ARGUMENT

I

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE COURT'S DECISION IN WHITE V. STATE, 377 So.2d 1149 (Fla. 1979) AND WILSON V. STATE, _____So.2d_____(Fla. 1983), CASE NO. 61,365; OPINION FILED JULY 21, 1983; 8 F.L.W. 265.

This Court made its definitive statement concerning conflict jurisdiction in Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960), wherein this Court said:

> "...the principal situations justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflicts are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of by this Court. Under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review the decision of the Court of Appeal. Under the second situation the controlling facts become vital and our jurisdiction may be asserted only where the Court of Appeal has applied a recognized rule of law to reach a conflicting conclusion in a case involving the same controlling facts as were involved in allegedly conflicting prior decisions of this Court.
>
> ---
>
> In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict within the limits above announced."

The petitioner's argument under this point attempts to place the opinion in question in category (2) as outlined in Nielson, supra. The answer to that is that it is rather obvious that the controlling facts in the case at bar are totally dissimilar to the facts in the White and Wilson opinions.

In both White, supra, and Wilson, supra, the closing comments by the prosecutors were merely objective comments upon the uncontradicted nature of the evidence. On the other hand, the argument in the case at bar was a subjective comment on the lack of a defense. The phrase "I haven't heard any" (defense) can hardly be construed to be a comment on uncontradicted evidence. To do so would require a Byzantine mind.

Thus, there is no express or direct conflict under category (2) in Nielson, supra.

II

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE OPINIONS IN STATE V. BOLTON, 383 So.2d 924 (Fla. 2d DCA 1980) AND GAINS V. STATE, 417 So.2d 719 (Fla. 1st DCA 1982).

The petitioner's argument under this point attempts to place the opinion in question in category (1) in Neilson, supra, i.e. "the announcement of a rule of law which conflicts with a rule previously announced" by another district court of appeal. This contention is diaphanous at best.

The rule of law applied by the Third District Court of Appeal in the case at bar was whether the comment was "susceptible of being interpreted by the jury as referring to the defendant's failure to testify." (A.1-2) The rule of law applied by the courts in Bolton and Gains, supra, was whether the prosecutor's comment was "of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

It is submitted that there is no express or direct conflict between the above-stated rules of law for the following reasons:

(a) The word "susceptible" is defined as "readily impressed." Webster Reference Dictionary, Encyclopedia Edition, p. 988. To argue that there is a difference between the words "naturaly and necessarily" and "readily impressed" is clearly a futile exercise in semantics.

(b) In Bolton, supra, the District Court, prior to announcing the rule of law in question, said:

> "No error is committed as long as it does not comment directly or covertly upon the failure of the accused to testify." (Emphasis supplied).

This holding is clearly in consonance with the rule of law relied upon by the Third District Court in the opinion in question.

(c) In David v. State, 369 So.2d 943 (Fla. 1979) this Court made the following pronouncement:

> "Any comment which is 'fairly susceptible' of being interpreted by the jury as referring to a criminal defendant's failure to testify constitutes reversible error, without resort to the harmless error doctrine."

The foregoing rule of law is identical to the rule of law followed in the opinion in question.

CONCLUSION

This Court is sans jurisdiction because the petitioner has failed to demonstrate a "real, live and vital conflict," and therefore, the Petition for Discretionary Review should be denied.

Respectfully subitted,

GELBER, GLASS, DURANT, CANAL
& GRANDE, P.A.
1250 N.W. 7th Street
Suites 202-205
Miami, Florida 33125
(305) 326-0090

By N. Joseph Durant
N. JOSEPH DURANT, ESQUIRE
Special Asst. Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida 33128 this 1st day of November, 1983.

By N. Joseph Durant
N. JOSEPH DURANT, ESQUIRE