IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,621

ANTHONY DUMAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, Anthony Dumas, was the Appellant in the District Court of Appeal of Florida, Third District, and the Defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. The Respondent, the State of Florida, was the Appellee in the District Court of Appeal and the prosecution in the trial court. The parties will be referred to in this brief as they stand before this Court. The symbol "A" will be utilized to designate the Appendix to this brief. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts Petitioner's Statement of the Case and Facts as a substantially true and correct account of the proceedings below.

POINT INVOLVED ON APPEAL

I

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN CIRIO V. STATE, __So.2d (Fla. 2d DCA 1983)(CASE NO. 83-400; OPINION FILED NOVEMBER 18, 1983) AND JOHNSON V. STATE, 411 So.2d 1023 (Fla. 2d DCA 1982)?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL. THIRD DISTRICT, IN THE INSTANT CASE, DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN CIRIO V. STATE, ___So.2d___ (Fla. 2nd DCA 1983)(Case No. 83-400; Opinion filed November 18, 1983) AND JOHNSON V. STATE, 411 So.2d 1023 (Fla. 2nd DCA 1982).

The Petitioner contends that the rule of law announced by the Third District Court of Appeal directly and expressly conflicts with the rule of law announced by the Second District Court of Appeal in Cirio v. State, __So.2d___ (Fla. 2nd DCA 1983)(Case No. 83-400; Opinion filed November 18, 1983) and Johnson v. State, 411 So.2d 1023 (Fla. 2nd DCA 1982). Respondent submits that the Third District did not announce a new rule of law , but only applied the facts of the case sub judice to the existing rule of law as to waiver of a jury trial.

Petitioner contends that the Third District announced the following rule of law:

> ...record evidence showing an information stamped "waived trial by jury with consent of state," above which is the signature of the Defendant is sufficient, on a direct appeal from a judgment of conviction, to support a finding of an effective, waiver of that constitutional right.
>
> Petitioners brief at page 4.

Petitioner further contends that the aforementioned rule of law is in conflict with that of the Second District Court of Appeal announced in Cirio v. State, supra and Johnson v. State, supra, where an effective waiver had to be:

> . . . knowing, voluntary and intelligent waiver of a jury trial must be shown affirmatively from the record below.

Respondent submits that upon closer scrutiny of the Third District's opinion, it is clear that all the Court did was apply the facts in the case sub judice to the knowing, voluntary and intelligent standard. The Court found that in this case, record evidence showing a information stamped "waived trial by jury with consent of State", above which is the signature of the defendant is sufficient, on a direct appeal from a judgment of conviction, supported an effective waiver of that constitutional right.

The Court in finding the waiver to be effective (knowing, voluntary and intelligently made), the court applied the presumption:

> Where a record shows a waiver, although there is no further evidence that the waiver was executed in open court, there is a presumption that in the regular course of the

> proceedings the defendant, through his attorney, learned of, and waived his constitutional right to jury trial. The presumption which springs from defendant's signature on the formal charging document denoting waiver of jury trial, is, more precisely, that the defendant was advised by his attorney of his right to trial by jury, the consequences of relinquishing that right, and any advantages to be expected therefrom, all of which makes for the knowing and intelligent waiver required by Patton v. United States, 281 U.S. 276 (1930).
>
> (A. 2-3)(Footnotes omitted).

This analysis is further buttressed when the Court stated:

> . . . we think it unnecessary to adopt a prophylactic rule that the absence of a record inquiry as to waiver of jury trial, without more, requires reversing a conviction and ordering a new trial.
>
> (A. 8).

The Third District contrary to Defendant's contention, did not announce a new rule of law. Instead, the Court found that where a defendant signs a waiver of jury trial, which is contained in the record a presumption of regularity is applied, thereby making the waiver knowing, voluntary, and intelligent. The presumption's applicability is further enhanced since:

> Appellant did not attack the waiver in the trial court, there is nothing in the record which suggests that the waiver was not voluntary on intelligent and, more

> importantly, Appellant has not even asserted by this appeal that the waiver was involuntary or unintelligent. (Footnote omitted).
>
> (A. 8).

There is no conflict between the case sub judice and Cirio and Johnson. In both cases the defendant did not execute written waiver of his right to a jury trial. The absence of a written waiver made the courts failure to conduct an inquiry to determine if the waiver was knowing, voluntary and intelligent fatal to the finding of waiver. If the Defendants had executed written waivers, then the presumption of regularity would apply and evidence would be sufficient for a finding of effective waiver of jury trial.

This analysis has been endorsed in the Fourth District Court of Appeal in Williams v. State, __So.2d__, (Fla. 4th DCA 1903) (Case No. 82-1610; opinion filed September 28, 1983), when the court held:

> . . . for future guidelines, we endorse the following remarks of the Third District Court of Appeal in Sessums v. State, 404 So.2d 1074, 1075-76 (Fla. 3d DCA 1981):
>
> > Though the better practice is for a trial court to interrogate a defendant so as to satisfy itself that the defendant is fully apprised of his right to a jury trial and that the waiver of that right is made intelligently and voluntarily, Viggiani v. State, 390 So.2d 147 (Fla. 3d DCA 1980), rev. granted, 402

So.2d 613 (Fla. 1981); Quartz v. State, 258 So.2d 283 (Fla. 3d DCA 1972), cert. denied, 263 So.2d 825 (Fla. 1972), the only requirements of Florida Rule of Criminal Procedure 3.260 providing for waiver of jury trial, are that a waiver of a jury trial be in writing, see Powers, v. State, 370 So.2d 854 (Fla. 3d DCA 1979), cert. denied, 379 So.2d 209 (Fla. 1979); Tosta v. State, 352 So.2d 526 (Fla. 4th DCA 1977), cert. denied, 366 So.2d 885 (Fla. 1978); Molfetas v. State, 323 So.2d 598 (Fla. 3d DCA 1975), and that the State consent, see State ex rel Gerstein v. Baker, 339 So.2d 271 (Fla. 3d DCA 1976). Florida, unlike some jurisdictions, has never required by statute, rule or case law that the court itself inform the defendant of this right or make direct inquiry of the defendant as to the voluntariness of his waiver.

Under Florida law a waiver will be effective when there is consent of the parties and a defendant has either signed a written waiver in court which is made part of the record, Durcan v. State, 383 So.2d 248 (Fla. 3d DCA 1980); Russell v. State, 342 So.2d 96 (Fla. 3d DCA 1977), Kinser v. State, 291 So.2d 80 (Fla. 3d DCA 1974), cert. denied, 297 So.2d 832 (Fla. 1974), cert. denied, 420 U.S. 972, 95 S.Ct. 1393, 43 L.Ed.2d 652 (1975), or has previously signed a written waiver which is made part of the record and, in addition, either personally or through his counsel orally waives a jury trial in open court. Quartz v. State, supra [Footnotes omitted.]

CONCLUSION

Respondent submits that the Second District Court of Appeals decisions in Cirio v. State, supra, and Johnson v. State, supra do not directly and expressly conflict with the case sub judice. Therefore, Respondent would respectfully urge this Court to deny Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF JURISDICTION was served by mail upon Howard K. Blumberg, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 27th day of December, 1983.

MICHAEL J. NEIMAND
Assistant Attorney General

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