

IN THE SUPREME COURT OF FLORIDA

RAYMOND LEE SMITH,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Case No. 64,678

FILED

SID J. WHITE

JAN 24 1984

CLERK, SUPREME COURT

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RESPONDENT'S BRIEF ON JURISDICTION

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IN THE SUPREME COURT OF FLORIDA

RAYMOND LEE SMITH,

Petitioner,

v.

Case No. 64, 678

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.03 0 (a)(2)(A)(iv).

In this brief the parties will be referred to by their proper names or as they stand before this court. All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent would rely on the statement of the case and facts as set forth in the opinion of the District Court of Appeal. Smith v. State, Case Number 82-2155, opinion filed November 23, 1983.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL, RAYMOND LEE SMITH, CASE NUMBER 82-215 DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH STATE V. CASPER, 417 So.2d 263 (FLA. 1st DCA 1982) ON THE SAME POINT OF LAW.

The scope of review by this Court of a decision of the District Court of Appeal is extremely limited when the asserted basis of jurisdiction is an alleged conflict of such decision with the earlier decision of another appellate court or the Supreme Court on the same point of law. South Florida Hospital Corporation, 118 So.2d 25 (Fla. 1960). In order for this Court to interfere with the judgment of the District Court of Appeals on this ground, it must appear that the District Court has in the decision made a pronouncement of a point of law which is in direct conflict with the pronouncement on the same point of law in a decision of the Supreme Court or of another District Court of Appeal. Article V, Section 3(b)(3), Florida Constitution; Florida Rules of Appellate Procedure, 9.030(a)(2)(A)(iv).

Respondent agrees with petitioner that the facts of the instant case and State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982) are nearly identical, and thus, the cases would appear to be in conflict. In order to invoke this type of jurisdiction, however, the test is whether the decision of the District Court on Appeals on its face conflicts with the prior decision of the Supreme Court or another District Court of Appeals on the same point of law so as to create an "inconsistency or conflict among

the precedents". Nielsen v. Sarasota, 117 So.2d 731 (Fla. 1960); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); Kincaid v. World Ins. Co., 157 So.2d 517 (Fla. 1963). The instant decision does not on its face conflict with State v. Casper.

In arriving at its decision, the lower court relied primarily upon State v. Cruz, 426 So.2d 1308 (Fla. 2d DCA 1983). Cruz, decided subsequent to State v. Casper, holds that where a defendant's intent or state of mind is at issue, predisposition is a question of fact and should not be decided on a motion to dismiss under Rule 3.190 (c)(4), Florida Rules of Criminal Procedure. This argument was not advanced in Casper until the state's motion for rehearing, and then dismissed on procedural grounds as untimely. See, State v. Casper, 417 So.2d at 264. Because Casper did not reach the merits of the Cruz argument, the two decisions were not decided on the same point of law and no conflict exists. Petitioner has failed to demonstrate an "inconsistency or conflict among the precedents." Nielsen v. Sarasota, supra; Kyle v. Kyle, supra; Kincaid v. World Ins. Co., supra.

CONCLUSION

Based on the foregoing argument, reasoning, and citations of authority, Respondent respectfully requests that this Court decline to exercise its discretionary jurisdiction since no conflict exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Robert F. Moeller, Assistant Public Defender, 455 N. Broadway, Hall of Justice Building, Bartow, Florida 33830, on this 24th day of January, 1984.

Theda James Davis
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