IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 2 1984
CLERK, SUPREME COURT
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Chief Deputy Clerk

SYE CHRISTOPHER JENKINS,)
Petitioner,)
v.) Case No.
STATE OF FLORIDA,)
Respondent.)

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	i
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
POINT INVOLVED	3
ARGUMENT	4-8
THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISIONS CITED BY PETITIONER.	
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

	PAGE
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	8
McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962)	4
Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960)	4
State v. Rhoden, ___ So.2d ___, Case No. 62,918 (Florida opinion filed April 5, 1984) [9 FLW 123]	4,5,6,7

OTHER AUTHORITY

Fla.R.App.P. 9.120(d)	2
Fla.R.App.P. 9.030(a)(2)(A)(iv)(1984)	4
§ 39.111(6), Fla.Stat. (1981)	4,5
§ 947.16(3), Fla.Stat. (1981)	6
Fla.R.Crim.P. 3.850	7

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellant in the Fourth District Court of Appeal for the State of Florida. Respondent was the prosecution in the trial court and the appellee in the appellate court. In this brief the parties will be referred to as they appear before this court.

The symbol "A" will denote the Appendix to Petitioner's Brief on Jurisdiction. All emphasis in this brief is supplied by respondent, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts only those portions of petitioner's statement of the case and statement of the facts which recite the content of the Fourth District's written opinion. Respondent maintains that the motion for rehearing, notice of supplemental authority, and amended motion for rehearing are not properly included in petitioner's appendix in this jurisdictional stage of the proceeding. See Fla.R.App.P. 9.120(d).

POINT INVOLVED

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE CONFLICTS WITH THE DECISIONS CITED BY PETITIONER?

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE INSTANT CASE DOES NOT CONFLICT WITH THE DECISIONS CITED BY PETITIONER.

This court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of this court on the same point of law. Fla.R.App.P. 9.030(a)(2)(A)(iv)(1984). For purposes of establishing jurisdiction, conflict may appear as the announcement of a rule of law which conflicts with the rule previously announced, or by the application of the rule of law to produce a different result in a case which involves substantially the same controlling facts. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). Further, jurisdiction may be assumed on the ground that the decision at issue creates a conflict by expressly accepting an earlier decision of this court as controlling precedent in a situation materially at variance with the case relied on, that is, that the decision at issue misapplied precedent. McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962).

Petitioner first maintains that the instant decision conflicts with this court's opinion in State v. Rhoden, ___ So. 2d ___, Case No. 62,918 (Florida opinion filed April 5, 1984) [9 FLW 123], where this court determined that the contemporaneous objection rule did not bar appellate review of the failure of the trial judge to follow the mandate of § 39.111(6), Fla.Stat. (1981). That provision provides the mechanism whereby the

trial judge decides whether a juvenile who has been tried as an adult will receive juvenile sanctions or whether he will be incarcerated as an adult. In other words, it determines whether the defendant will serve any time in jail at all. In Rhoden the trial judge sentenced the defendant to a mandatory ten-year term of imprisonment without addressing any of the "six criteria pertaining to the suitability or unsuitability of adult sanctions" at all. 9 FLW at 123. Thus, in Rhoden the trial judge not only failed to reduce his findings to writing, but he failed to make any determination pursuant to the statute; instead, he simply threw the defendant in jail.

In determining that that issue could be reached without objection, this court relied upon the statement of legislative intent incorporated in the statute itself which states that "'[i]t is the intent of the Legislature that the foregoing criteria and guidelines shall be deemed mandatory and that a determination of disposition pursuant to this subsection is subject to the right of the child to appellate review pursuant to s.39.14.'(Emphasis added.)" 9 FLW at 124. Further, this court pointed out that if the contemporaneous objection rule was applied in that case, a defendant could be sentenced "to a term of years greater than the legislature mandated and, if no objection was made at the time of sentencing, the defendant could not appeal the illegal sentence." Id. In the context of the Rhoden case, if the provisions of § 39.111(6) are not

followed, a defendant who is sentenced to only one day of adult incarceration could thereby be sentenced to a term greater than the legislature mandated, since that section was intended to force a trial judge to consider disposition other than incarceration.

In arguing that the instant decision conflicts with the *Rhoden* case, petitioner seeks to apply that case to abrogate the applicability of the contemporaneous objection rule in *any* sentencing context. Respondent maintains that there is no conflict because the two cases arise from totally different facts involving totally different sentencing provisions; the instant case involved the retention of jurisdiction by the trial judge at the time of sentencing. *See* § 947.16(3), *Fla*.*Stat*. (1981). Here, petitioner, being an adult, was not eligible for juvenile sanctions. Further, since he was sentenced to a term of seventy five-years, it cannot be credibly argued that an improper application of the retention statute would lengthen his term of incarceration, unless he is so dilatory that he does not file a motion to vacate or correct his sentence for twenty-five years. Thus, unlike in *Rhoden*, the alleged error here does not *necessarily* cause a defendant to suffer a period of incarceration beyond that which the legislature had envisioned; in *Rhoden* the error

did, since the legislature envisioned the possibility that the defendant not be incarcerated at all. A defendant in petitioner's position is not without remedy, for as the fourth district noted in its opinion, he can still seek collateral review of the retention decision by a motion pursuant to Fla.R.Crim.P. 3.850 before the trial court, which is in the best position to correct the type of error of which petitioner complains. Unlike the juvenile defendant in Rhoden, the alleged error here does not deprive petitioner of his right of review. Thus, respondent maintains that the instant case illustrates well why the Rhoden decision does not apply in all sentencing contexts; there is no conflict here and no basis upon which this court should exercise its discretionary jurisdiction.

Petitioner also requests that this court undertake a review of the sufficienty of the evidence. In doing so, he relies on facts which do not appear in the fourth district's decision. In its opinion, the fourth district stated: "Appellant, together with two other males, allegedly robbed a convenience store. One of the other individuals had a gun." In his argument and in his statement of the facts, petitioner argues that he left with one of the other two men, while the third man remained behind and robbed the store. Thus, petitioner attempts to predicate decisional conflict on facts

which do not appear in the instant decision, which he cannot do because this court's jurisdiction is predicated on conflict of decisions. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Further, in seeking review of the sufficiency of the evidence, what petitioner is really seeking here is a second appeal after his arguments have failed in the trial court and in the fourth district. A discretionary review proceeding is not intended to be a second appeal. Thus, respondent maintains that there is no basis for exercising this court's jurisdiction on the second issue raised by petitioner.

CONCLUSION

Based on the foregoing argument, respondent respectfully maintains that no decisional conflict has been presented, and respectfully requests that this court decline to exercise its discretionary jurisdiction in this case.

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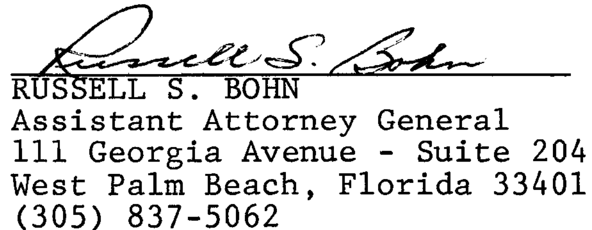

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 28th day of June, 1984 by Mail/Courier to GARY CALDWELL, ESQUIRE, Assistant Public Defender, Harvey Building, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401.

OF COUNSEL