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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,120

EUGENE EDWARD MORRIS,
a/k/a MERCURY MORRIS,
a/k/a EUGENE MORRIS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON JURISDICTION

JIM SMITH
Attorney General

JANET RENO
State Attorney
Eleventh Judicial Circuit of Florida

ANTHONY C. MUSTO
Assistant State Attorney
1351 Northwest 12th Street
Sixth Floor
Miami, Florida 33125
Tel.: (305) 547-7093

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES..	ii
INTRODUCTION..	1
STATEMENT OF THE CASE AND FACTS.............................	1
ARGUMENT	
I. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE DOES NOT CONFLICT WITH THE OPINIONS IN STATE V. LIPTAK, 277 SO.2D 19 (FLA. 1973); JENKINS V. STATE, 422 SO.2D 1007 (FLA. 1st DCA 1982); BROWN V. STATE, 299 SO.2D 37 (FLA. 4th DCA 1974) AND SAVIANO V. STATE, 287 SO.2D 102 (FLA. 3d DCA 1973)...........	2
II. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE DOES NOT CONFLICT WITH THE OPINIONS IN EATON V. STATE, 438 SO.2D 822 (FLA. 1983); BELL V. STATE, 369 SO.2D 932 (FLA. 1979); LASHLEY V. STATE, 67 SO.2D 648 (FLA. 1953) AND STATE V. CASPER, 417 SO.2D 263 (FLA. 1st DCA 1982)..	5
CONCLUSION..	6
CERTIFICATE OF SERVICE......................................	7

TABLE OF AUTHORITIES

CASES	PAGE
Bell v. State, 369 So.2d 932 (Fla. 1979)	5
Brown v. State, 299 So.2d 37 (Fla. 4th DCA 1974)	2,3,4
Eaton v. State, 438 So.2d 822 (Fla. 1983)	5,6
Florida v. Rodriguez, ___ U.S. ___ (1984) [36 Cr.L 4086]	4
Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982)	2,3
Kincaid v. World Insurance Company, 157 So.2d 517 (Fla. 1963)	4
Lashley v. State, 67 So.2d 648 (Fla. 1953)	5
Saviano v. State, 287 So.2d 102 (Fla. 3d DCA 1973)	2,3,4
State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982)	5
State v. Liptak, 277 So.2d 19 (Fla. 1973)	2,3

OTHER AUTHORITIES	
Florida Statute § 90.803(3)(a)(1)	2
Florida Statute § 90.803(3)(a)(2)	2

INTRODUCTION

Petitioner was the defendant in the trial court and the appellant on appeal. Respondent was the prosecution in the trial court and the appellee on appeal. The parties will be referred to in this brief as "Defendant" and "the State." The symbol "A" will constitute a reference to the appendix being filed with this brief, consisting of a copy of the district court opinion which Defendant seeks to have reviewed.

STATEMENT OF THE CASE AND FACTS

Defendant was convicted of conspiracy to traffic in cocaine, trafficking in cocaine and two counts of possession of cocaine (A 1). He was acquitted on two counts of sale or delivery of cocaine (A 3).

One of the State's witnesses was Fred Donaldson, a friend of Defendant's who had turned confidential informant (A 1). Donaldson made a controlled call from the State Attorney's office to Defendant, during which Defendant indicated a willingness to enter into a drug deal with Donaldson's purported friend Joe (A 2). Several meetings followed, with Donaldson introducing undercover agent Joe Brinson to Defendant as Donaldson's drug dealer friend Joe (A 2). Brinson negotiated with Defendant to purchase a quantity of cocaine (A 2). After several contacts, both in person and on the telephone, during which various matters were negotiated, an agreement was reached to meet at Defendant's house (A 2). At the meeting, Defendant and co-defendant Vincent Cord were arrested and a package of cocaine was seized (A 2).

At trial, Defendant asserted entrapment as his defense (A 2). At no time was it disputed that Donaldson intended to set up Defendant, nor was any of Donaldson's conduct in dispute (A 3). Thus, when Defendant sought to introduce the testimony of Eugene Gotbaum, who, according to the proffer, would have testitied that he knew Donaldson and that Donaldson had stated that he intended to set Defendant up (A 2), the trial court excluded the testimony (A 2).

On appeal, the Third District Court of Appeal reviewed the propriety of the

exclusion of Gotbaum's testimony (A 2-3). The court rejected Defendant's claim that the hearsay testimony of Donaldson's statement should be admitted under the state of mind exception in light of the fact that the Florida evidentiary code provision dealing with this exception, Florida Statutes § 90.803(3)(a)(1) and (2), provides that the state of mind exception applies only "when such state is an issue in the action (A 2; emphasis in opinion)." The court also found that in light of the lack of dispute as to Donaldson's actions, Gotbaum's testimony was irrelevant (A 3). The court summed up its conclusion as follows:

> Gotbaum's testimony was offered to prove Donaldson's intent to set up Morris. It constituted inadmissible hearsay because Donaldson's intent was not at issue and thus, did not become admissible under the aegis of the statutory exception. In addition, because there was no question that Donaldson notified the police of Morris's activities, Donaldson's conduct was not disputed and, accordingly, his statement was not relevant. Although his motive might have been relevant had it been necessary to prove whether Donaldson informed police, under the posture of the evidence presented at trial, the trial court properly excluded Gotbaum's testimony.
>
> (A 3; emphasis in opinion)

Defendant also asserted in the Third District that in light of the not guilty verdicts on the two counts of sale or delivery of cocaine, the verdicts in this case were legally inconsistent. The court recognized the general principle that a jury is required to return consistent verdicts as to the guilt of an individual on interlocking charges, but rejected Defendant's claim since "the jury did not return verdicts on interlocking charges, but rather acquitted Morris of charges separate and distinct from those upon which he was convicted (A 3)."

ARGUMENT

I

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE DOES NOT CONFLICT WITH THE OPINIONS IN STATE V. LIPTAK, 277 SO.2D 19 (FLA. 1973); JENKINS V. STATE, 422 SO.2D 1007 (FLA. 1st DCA 1982); BROWN V. STATE, 299 SO.2D 37 (FLA. 4th DCA 1974) AND SAVIANO V. STATE, 287 SO.2D 102 (FLA. 3d DCA 1973).

It is difficult to understand the asserted basis for conflict between the Third District's opinion in the present case and the opinions in the cases cited by Defendant, as none of those opinions even dealt with the same issue as did the opinion in the present case.

The Third District's opinion found that testimony regarding Donaldson's statement that he intended to set up Defendant was not admissible under the state of mind exception to the hearsay rule because the state of mind was simply not at issue under the facts of this case, as it plainly must be under the Florida evidence code for the state of mind exception to apply. The court also found that the testimony was not relevant in light of the lack of dispute as to Donaldson's actions.

The cases cited by Defendant do not deal at all with the question of whether the declarant's state of mind was at issue in a particular case or with the question of relevancy. Rather, they are concerned with all sorts of other issues and are apparently cited together in an effort to create sufficient confusion to induce this court to grant jurisdiction.

The allegation of conflict with State v. Liptak, 277 So.2d 19 (Fla. 1973), is frivolous. That case was concerned solely with a sufficiency of the evidence issue in light of an entrapment claim. It was in no way concerned with any issue regarding the admissibility of evidence.

Equally without merit is Defendant's claim regarding Jenkins v. State, 422 So.2d 1007 (Fla. 1st DCA 1982). In that case, there was not even an entrapment defense offered. Rather, the defendant claimed self-defense and the court's opinion holds that a prior statement by the victim threatening the defendant was admissible. Any conflict claim regarding this case is so plainly groundless as to require no further discussion.

In the other cases cited by Defendant, Brown v. State, 299 So.2d 37 (Fla. 4th DCA 1974) and Saviano v. State, 287 So.2d 102 (Fla. 3d DCA 1973), the courts dealt with issues regarding the admissibility of testimony of certain conversations

between the defendants and other individuals regarding the question of inducement, but did so only in the framework of whether such conversations generally constitute hearsay. The courts did not even touch on the question of whether such statements are admissible when, as is true in the present case, the declarant's state of mind is not at issue. Clearly, the Third District's opinion in the present case accepts the principles set forth in Brown and Saviano, and merely refuses to extend those principles to a materially different factual situation than that dealt with in those cases. Plainly, no conflict exists.

It is obvious that Defendant is seeking review not because of any arguable conflict, but just because he believes the Third District incorrectly decided the case.[1] "[T]he Florida appellate system," however, "has been carefully structured to enable the state's highest court to concentrate on matters of greater public importance than the possibility that a trial judge's error might not have been corrected by the intermediate court of appeal." Florida v. Rodriguez, ___ U.S. ___ at ___ (1984), Stevens, J., dissenting, 36 Cr.L 4086 at 4088. As this court noted in Kincaid v. World Insurance Company, 157 So.2d 517, 518 (Fla. 1963), the measure of this court's jurisdiction is not whether this court would have reached a different conclusion than did the district court, but whether the district court decision "on its face collides with a prior decision of this Court or another District Court on the same point of law so as to create an inconsistency or conflict among the precedents."

There can be doubt that this standard has not been met. A reading of the district court's opinion in the present case and those opinions cited by Defendant demonstrates that the cases deal with entirely different issues and the conclusions

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[1] The State of course disagrees with this belief, but will not address the matter here as it is an improper subject for discussion in a brief on jurisdiction.

reached are in no way inconsistent. Defendant's conflict claims are merely transparent efforts to reargue the merits of the case and fail to set forth any basis for this court assuming jurisdiction. Accordingly, Defendant's claims should be rejected.

II

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE DOES NOT CONFLICT WITH THE OPINIONS IN EATON V. STATE, 438 SO.2D 822 (FLA. 1983); BELL V. STATE, 369 SO.2D 932 (FLA. 1979); LASHLEY V. STATE, 67 SO.2D 648 (FLA. 1953) AND STATE V. CASPER, 417 SO.2D 263 (FLA. 1st DCA 1982).

The frivolous nature of Defendant's argument to the first point discussed in this brief is rivaled only by the similar nature of his argument to this point. Petitioner here has argued the merits of his claim regarding allegedly inconsistent verdicts, rather than making any serious effort to demonstrate conflict.

Petitioner makes a bare allegation of conflict with Bell v. State, 369 So.2d 932 (Fla. 1979); Lashley v. State, 67 So.2d 648 (Fla. 1953) and State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), but proceeds to make no argument whatsoever regarding any such conflict. Instead he cites these cases only for the definition of entrapment (Petitioner's brief on jurisdiction, p. 9). The district court opinion in the present case sets forth that very definition, even citing to Lashley and Casper in the process (A 2-3). The allegation of conflict as to these cases is patently absurd.

Defendant also alleges conflict with Eaton v. State, 438 So.2d 822, 823 (Fla. 1983), citing to a portion of that opinion which reads that the juries are required "to return consistent verdicts as to the guilt of an individual on interlocking charges." This is exactly the portion of Eaton quoted and applied by the district court in its opinion (A 3). The court then went on to find that

the charges here were not interlocking, but were separate and distinct (A 3), which, incidentally, was the precise result reached in Eaton also. Obviously, no conflict exists.

It is clear that Petitioner, as he did regarding the first point discussed in this brief, is not really arguing the existence of conflict, but is rearguing the merits of his claim. He is even so blatant in his efforts as to cite cases from the United States Supreme Court and from a New York state court. The State incorporates and reasserts the arguments and authorities cited previously in this brief discussing the improper nature of such argument and the fact that it cannot form a basis for the granting of jurisdiction.

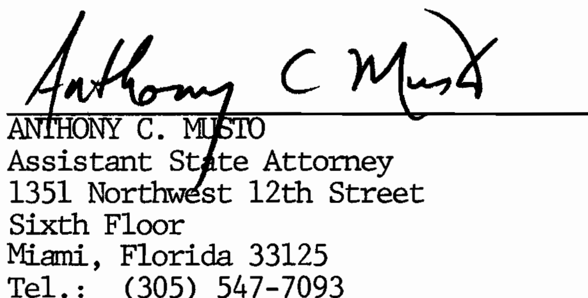
CONCLUSION

Defendant has failed to set forth even an arguable basis for the invocation of this court's jurisdiction. Rather, he has reargued the merits of claims rejected by the district court. He has done so in an obvious manner, in total disregard of the purpose of a brief on jurisdiction. There can be question that this court should decline to accept jurisdiction.

Respectfully submitted,

JIM SMITH
Attorney General

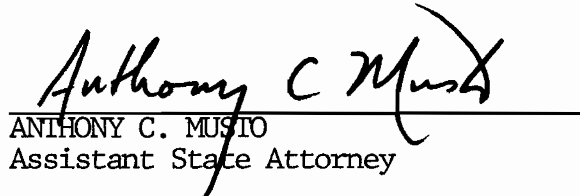
JANET RENO
State Attorney
Eleventh Judicial Circuit of Florida



ANTHONY C. MUSTO
Assistant State Attorney
1351 Northwest 12th Street
Sixth Floor
Miami, Florida 33125
Tel.: (305) 547-7093

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of that above Brief of Respondent on Jurisdiction was mailed to N. Joseph Durant, Esquire, Gelber, Glass, Durant, Canal & Pineiro, P.A., 1250 Northwest 7th Street, Miami, Florida 33125 and to Phillip Glatzer and Ronald I. Strauss, Highsmith, Strauss & Glatzer, P.A., 3370 Mary Street, Coconut Grove, Florida 33133 on this the 28th day of November, 1984.



ANTHONY C. MUSTO
Assistant State Attorney