

IN THE SUPREME COURT OF FLORIDA

FILED

S'D J. WHITE

DEC 26 1984

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

JOSEPH T. SPILLANE,)
 Petitioner,)
 vs.)
 STATE OF FLORIDA,)
 Respondent.)
 _____)

Case No: 66,293

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

In this Jurisdictional Brief, the parties will be referred to as they appear before this Honorable Court, Petitioner and Respondent. The Petitioner was the Appellant, and the Respondent was the Appellee in the court below, the Fourth District Court of Appeal. In the trial court, the Petitioner was the Defendant, and the Respondent was the State of Florida.

Reference to those portions of the lower court record filed herewith and attached hereto as an Appendix to the instant Brief, will be symbolized by the letter "A", followed by the appropriate Appendix number. In this Brief, all emphasis will be supplied by the Petitioner, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by Information with D.W.I. Manslaughter. (A. 1). Immediately prior to trial, the State moved in limine to prohibit Petitioner from introducing any evidence concerning the decedent's conduct and potential negligent activities immediately preceding his death. The State argued that the crime for which the Petitioner was charged, D.W.I. Manslaughter, was a strict liability crime,

and because the State was not required to prove the elements of negligence and proximate causation, any evidence of the decedent's negligence was therefore immaterial and irrelevant. The trial court granted the State's motion. During the jury charge conference, the State requested the trial court to instruct the jury on the offense of vehicular homicide, arguing that such offense was a lesser included offense of D.W.I. manslaughter. The Petitioner objected to an instruction on vehicular homicide being given, arguing that vehicular homicide was not a lesser included offense of D.W.I. manslaughter, and secondly, due to the pretrial ruling precluding the defense from introducing any evidence of the decedent's negligence, it would be unfair to permit the jury to consider an offense for which the Petitioner had been prohibited from defending against. The jury ultimately found the Petitioner guilty of vehicular homicide. (A. 2).

On appeal, the Petitioner argued that vehicular homicide was not a lesser included offense of D.W.I. manslaughter. In support of the Petitioner's position, the case of Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984), was cited and relied upon by the Petitioner for its holding that vehicular homicide is not a lesser included offense of D.W.I. manslaughter.

On November 7, 1984, the Fourth District Court of Appeal issued its Per Curiam Opinion stating:

We have considered all the points raised by the Appellant and find no reversible error demonstrated. However, we recognize that

our holding that vehicular homicide is a lesser included offense of D.W.I. manslaughter conflicts with the decision of the Second District Court of Appeal in Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984). (A. 3).

On December 5, 1984, the Fourth District Court of Appeal denied the Petitioner's Petition for Rehearing. (A. 11). Petitioner thereafter timely filed his Notice to invoke this Court's discretionary jurisdiction. (A. 12).

ARGUMENT

THE OPINION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH MASTRO V. STATE, 448 So.2d 626 (Fla. 2d DCA 1984), THEREBY RENDERING THIS HONORABLE COURT WITH THE JURISDICTION TO HEAR THE INSTANT CASE AND SETTLE THE CONFLICT RAISED.

It is well settled that in order to establish "conflict jurisdiction" pursuant to Article V, Section 3(b)(3), Fla. Const., and Fla. R.App.P. 9.030(a)(2)(A)(iv), the decision sought to be reviewed must expressly and directly create conflict. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962), this Court stated:

We have said that conflict must be such that if the latter decision and the earlier decision were rendered by the same court, the former would have the effect of overruling the latter. (citation omitted).

The Opinion rendered by the Fourth District Court of Appeal in the instant case expressly and directly conflicts with Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984), within the meaning of the above cited authorities.

The Petitioner was charged in the instant case by Information with D.W.I. manslaughter. (A. 1). At the State's request and over the Petitioner's objections, the jury was instructed on the alleged lesser included offense of vehicular homicide. Thereafter, the jury convicted the Petitioner of vehicular homicide. On appeal to the Fourth District, the Petitioner argued that vehicular homicide is not a lesser included offense of D.W.I. manslaughter. In support of his

argument, the Petitioner cited and relied upon Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984). (A. 13-15).

The Second District Court of Appeal in Mastro v. State, supra, at 627, held that under no circumstances could vehicular homicide be a Category 1 necessarily lesser included offense of D.W.I. manslaughter notwithstanding its designation as such in the Florida Standard Jury Instructions. (A. 14). The Mastro Court did hold that vehicular homicide may be a Category 2 lesser included offense of D.W.I. manslaughter, but based upon its particular facts, the Second District concluded that vehicular homicide was not a Category 2 lesser included offense.

In a Per Curiam Opinion, the Fourth District Court of Appeal stated in the instant case:

We have considered all the points raised by the Appellant and find no reversible error demonstrated. However, we recognize that our holding that vehicular homicide is a lesser included offense of D.W.I. manslaughter conflicts with a decision of the Second District Court of Appeal in Mastro v. State, 448 So.2d 626 (Fla. 2d DCA 1984). (A. 3).

Thus, the Fourth District, on the face of its Opinion, acknowledged the express and direct conflict with Mastro v. State. Specifically stated, there now exists a direct and express conflict between the Fourth District and the Second District over whether vehicular homicide is a Category 1 necessarily lesser included offense of D.W.I. manslaughter. Accordingly, this Court has jurisdiction to resolve the conflict.

The Respondent, State of Florida, has also acknowledged the conflict between the instant case and Mastro v. State, supra. Before the Fourth District, in his Response to Petitioner's Petition for Rehearing and Request to Certify Conflict, the Respondent stated:

This Court [Fourth District] has clearly acknowledged conflict in its Opinion filed November 7, 1984....It is therefore not necessary for this Court to certify conflict herein since this Court's Opinion, on its face, allows for discretionary jurisdiction of the Florida Supreme Court... (A. 910).

The question of whether vehicular homicide is a lesser included offense of D.W.I. manslaughter is an issue in great conflict between the various district courts of appeal in this State. Recently, the First District Court of Appeal has joined with the Second District in holding that vehicular homicide is not a necessarily lesser included offense of D.W.I. manslaughter. Houser v. State, 456 So.2d 1265 (Fla. 1st DCA 1984). More recently, the Fifth District Court of Appeal has held that vehicular homicide is a Category 1 necessarily lesser included offense precisely because of its designation as such in the Florida Standard Jury Instructions. Higdon v. State, _____ So.2d _____ (Fla. 5th DCA 1984), 9 FLW 2457, Opinion rendered November 23, 1984. However, the Higdon Court certified the following question to this Court as one of great public importance:

IS THE SCHEDULE OF LESSER INCLUDED OFFENSES
PROMULGATED BY THE FLORIDA SUPREME COURT IN

1981 IN ERROR IN CLASSIFYING VEHICULAR
HOMICIDE (§782.071) AS A NECESSARILY LESSER
INCLUDED OFFENSE OF D.W.I. MANSLAUGHTER
(§860.01)?

The Petitioner respectfully requests this Court to
accept jurisdiction in the instant case and settle the
conflict.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, the Petitioner would respectfully request that this Honorable Court invoke its discretionary jurisdiction in the case sub judice, and settle the conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Robert Teitler, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, by U.S. Mail this 20 day of December, 1984.



DOUGLAS N. DUNCAN