

IN THE SUPREME COURT OF FLORIDA

RANDY ASHLEY TILLMAN,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

FILED

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CASE NO. ~~68,041~~

Chief Deputy Clerk

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

References to the appendices attached to petitioner's jurisdictional brief will be made by the symbol "App." followed by capital letter reference to the appropriate appendix and page number thereof.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth in petitioner's brief on pp. 1-7 thereof.

SUMMARY OF ARGUMENT

Under the Constitution as amended in 1980, this court does not have jurisdiction to review the lower court decision in the instant case because same does not and cannot expressly and directly conflict with a decision of another district court of appeal. The decision of this court in Jollie v. State, 405 So.2d 418 (Fla. 1981), does not authorize review because the question in the instant case for which petitioner seeks review is unrelated to the question certified by the district court in Whitehead v. State, 467 So.2d 779 (Fla.1st DCA 1985), and thus is not "pending review" before this court in the sense intended in Jollie v. State, supra.

ARGUMENT

ISSUE

THIS COURT SHOULD REFUSE JURISDICTION
BECAUSE THE DECISION OF THE LOWER COURT
DOES NOT EXPRESSLY AND DIRECTLY
CONFLICT WITH A DECISION OF ANOTHER
DISTRICT COURT OF APPEAL OR OF THIS
COURT ON THE SAME QUESTION OF LAW.

The decision that petitioner seeks to have this court review simply states: "AFFIRMED. See Whitehead v. State, 467 So.2d 779 (Fla.1st DCA 1985)." (App.A). Following amendment in 1980, Art. V, § 3(b)(3), Fla. Const., empowered this court to "review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." The decision for which review is sought--affirmance of judgment appealed, rendered without opinion except for citation of authority--does not, and under the constitutional provision as amended in 1980 cannot, "expressly and directly" conflict with another decision. It is the position of respondent that this court lacks the requisite constitutional authority to consider the instant petition for review.

Petitioner seeks comfort from Jollie v. State, 405 So.2d 418 (Fla. 1981), which held:

. . . a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute

prima facie express conflict and allows
this Court to exercise its
jurisdiction.

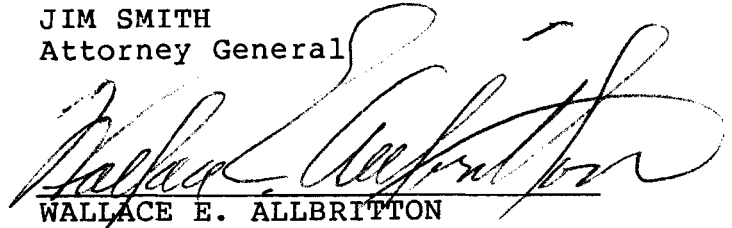
Id. at 420. While it is true that Whitehead v. State, supra, is "pending review" in this court, it is not pending review on discretionary review granted on the basis of conflict but rather, it is pending review on certified question by the lower court, Whitehead, 467 So.2d 780, which is not even peripherally relevant to the issue that petitioner seeks to have this court review in the instant case. Respondent can appreciate that had this court granted discretionary review in Whitehead based on a prima facie showing of the requisite conflict, then this would be a sufficient showing of conflict to allow this court to exercise its jurisdiction.

The issue in the instant case for which petitioner seeks review cannot be viewed as "pending review" in this court. Whitehead clearly holds that a trial judge's finding that a defendant is an habitual felony offender constitutes a clear and convincing reason for departure from the sentencing guidelines. But we emphasize that this has nothing to do with the issue certified by the First District in the Whitehead case. Risking the boredom of repetition, it is impossible to see how this court would have jurisdiction to review the instant case based on nothing more than a citation to Whitehead which is pending before this court on a totally different issue certified by the lower court.

CONCLUSION

Under the Constitution as amended in 1980, this court does not have authority to review the lower court decision in the instant case because same does not and cannot expressly and directly conflict with a decision of another court of appeal; neither does the reasoning of this court in Jollie v. State, supra, authorize review because the question in the instant case for which petitioner seeks review is not presently "pending review" before this court in Whitehead v. State, supra.

JIM SMITH
Attorney General



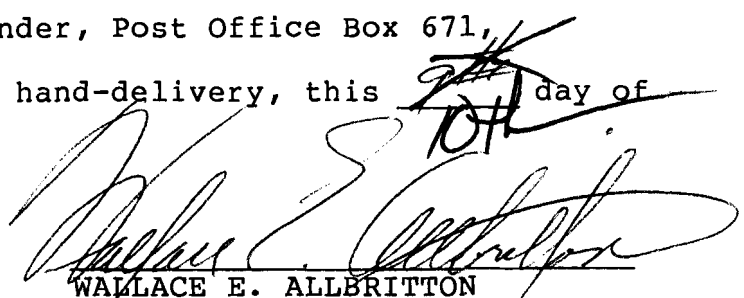
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief of Respondent on Jurisdiction to Mr. Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by hand-delivery, this ~~27th~~ 10th day of January, 1986.



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of Counsel