

IN THE SUPREME COURT OF FLORIDA

CHRISTIAN DANIEL MASSARD,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

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CASE NO. 69,173

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner herein, CHRISTIAN DANIEL MASSARD, was the Appellant, and the Respondent, STATE OF FLORIDA, the Appellee, in the Fourth District Court of Appeal. In this brief, the parties will be referred to as the "Petitioner" and the "Respondent", respectively.

"A" means Petitioner's Appendix to its Jurisdictional Brief, and "e.a." means emphasis added.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement, but makes the following additions, clarifications and corrections:

The District Court's ruling that the jury made a sufficient finding of the use of a weapon, for purposes of reclassification of the first-degree felonies to life felonies, was additionally based on instructions given to the jury, defining a "deadly weapon". (A, 2).

The District Court did not approve Petitioner's clear and present danger to society, as an acceptable reason for departure. (A, 3-4).

SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate that the Fourth District's opinion in this case, on its face, created express and direct conflict with prior decisions of this Court, or other district courts, on any of the issues raised by Petitioner.

POINT INVOLVED

WHETHER THE DECISION OF FOURTH DISTRICT COURT OF APPEAL PRESENTS "DIRECT AND EXPRESS CONFLICT" UNDER MEANING OF ARTICLE V OF FLORIDA CONSTITUTION; WHETHER, THEREFORE, PETITIONER HAS PROPERLY INVOKED THIS COURT'S JURISDICTION?

ARGUMENT

DECISION OF FOURTH DISTRICT COURT OF AP-
PEAL DOES NOT PRESENT "DIRECT AND EXPRESS
CONFLICT" UNDER MEANING OF ARTICLE V OF
FLORIDA CONSTITUTION; THEREFORE, PETI-
TIONER HAS NOT PROPERLY INVOKED THIS
COURT'S JURISDICTION.

In reviewing Petitioner's allegation of conflict to invoke this Court's discretionary certiorari jurisdiction, it is crucial to note that Article V, Section 3(b)(3) of the Florida Constitution requires a showing by Petitioner that there is "express and direct conflict" herein with the holding of another state District Court of Appeal, based upon the opinion, in this case, on its face. Dodi Publishing Company v. Editorial America, S.A., 285 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). Furthermore, such conflict certiorari may properly be established only by demonstrating that a present rule of law, announced in the present case by the District Court of Appeal, expressly conflicts with the rule of law, in a prior appellate decision. Mancini v. State, 312 So.2d 732 (Fla. 1975). Hollywood, Inc. v. Broward County, 108 So.2d 752 (Fla. 1959). It is thus clear that Petitioner has not established any basis for conflict certiorari.

Initially, Petitioner has maintained that the Fourth District's ruling on the enhancement of his first-degree felonies to life felonies, created express and direct conflict with the decision in State v. Overfelt, 457 So.2d 1385 (Fla. 1984), Streeter v. State, 416 So.2d 1203 (Fla. 3rd DCA 1982), and Clemon v. State, 473 So.2d 271 (Fla. 3rd DCA 1985). The Fourth District, in the subject case, found that in view of the guilty verdicts brought back on the attempted first-degree murder offenses "as

charged"; the charging document's specification that the offenses were committed with a blunt instrument; and the jury instructions given, which defined a deadly weapon, on a lesser-included offense, the jury "ha[d] made a sufficiently specific finding" that the crimes were performed by use of a weapon. (A, 1-2). Clearly, this does not conflict with Overfelt, supra; in fact, the Fourth District's ruling on this point follows the dictates of Overfelt, requiring a jury finding of the use of a firearm. Overfelt, at 1387. Petitioner's contention essentially amounts to a disagreement over the Fourth District's interpretation of the verdict, when coupled with the instructions and specific nature of the indictment, as such a finding. This amounts to a de facto re-argument, by means of a second direct appeal, of the issue raised before the Fourth District, and does not establish the propriety of certiorari review. Jenkins, supra; Sanchez v. Wimpy, 409 So.2d 20 (Fla. 1982).

Since not in conflict with Overfelt, the Fourth District's decision did not create express conflict with Streeter, supra, which was cited in Overfelt. Overfelt, at 1387. Furthermore, the Streeter decision involved the issue of whether the finding of the use of weapon, on a separate count and charge, supplied the necessary jury finding on use of a weapon, on a different count or charge. Streeter, at 1206. This clearly does not involve a different ruling, on the same question of law, with the Fourth District's facial opinion. Jenkins. Finally, Clemon is distinguishable as well, since both the verdict and the charging document in Clemon made no reference to a deadly weapon. Clemon, at 272. This obviously presents a different ruling, based on a different set of fac-

tors not present herein, thus demonstrating no actual or express conflict. Jenkins; Mancini, supra.

Petitioner argues that the notation by the Fourth District, ["but see Vicknair v. State (citation omitted)," A, 3], in its ruling on the propriety of habitual felony offender status as a basis for sentencing departures, is the "functional equivalent" of a certification of the existence of direct conflict. Petitioner's Brief, at 7. Petitioner can not and does not cite any authority for this position. Furthermore, the decision in Vicknair was based upon express distinctions and discussion, concerning the nature of the habitual felony offender statute, Vicknair, supra, at 897, that do not appear on the face of the Fourth District's opinion herein. Thus, no actual, express conflict can be established on this point. Jenkins.

Petitioner's reliance for conflict, on the Fourth District's ruling on his "clear and present danger" to society (A, 3), selectively ignores the fact that while the Fourth District made the observation quoted by Petitioner, the Court expressly rejected reliance on such a fact, as a proper basis for departure. (A, 4). This obviously does not create any conflict.

Finally, Petitioner suggests that the Fourth District's reliance on the manner in which the crime was committed, and the injuries Petitioner's conduct caused the victims, as an appropriate basis for departure, created conflict with State v. Mischler, 488 So.2d 523 (Fla. 1986), and Carney v. State, 458 So.2d 13 (Fla. 1st DCA 1984). Since neither of those decisions confronted the exact reason approved by the

Fourth District in this regard, and since the Fourth District's reliance on the manner of a criminal defendant's conduct, resulting in "disabling injuries", did not constitute facially express conflict on this point, Petitioner's claim of conflict has no merit here either. Jenkins. It is interesting to note that this Court's approval of the decision that the Fourth District relied on, for support of its ruling on this Point, (State v. Davis, 477 So.2d 565 (Fla. 1985)), approving Davis v. State, 458 So.2d 42 (Fla. 4th DCA 1984), also mandates rejection of certiorari, on this ground.


Since Petitioner has completely failed to make any showing of the existence of direct and express conflict between the Fourth District's opinion, and those cited by Petitioner, the pending request for discretionary review should be denied.

CONCLUSION

Based on the argument and authorities cited herein, Respondent respectfully requests that this Honorable Court DENY jurisdiction and certiorari review of this case.

Respectfully submitted,

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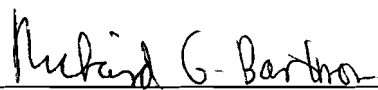


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished, by courier delivery, to JEFFREY L. ANDERSON, ESQUIRE, Assistant Public Defender, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401, on this 8th day of September, 1986.



Of Counsel