

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
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CLERK, SUPREME COURT
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STEPHEN WILLIAM BRADLEY,

Petitioner,

v.

CASE NO. 69,657

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The respondents note that the petitioner's recitation of the specifics of the decision in the Fifth District Court of Appeal at issue failed to note that the district court clearly distinguished Curtis v. State, 487 2d 1277 (Fla. 1985) - the opinion upon which the petitioner asserts conflict - from the instant case finding that the operative facts sub judice were different. Bradley v. State, 11 F.L.W. 2141, 2142 (Fla. 5th DCA Oct. 9, 1986). Specifically the district court noted that the jury's request in the instant case did not involve testimony given during the trial or an instruction on applicable law regarding that testimony such that the specific requirements of Florida Rule of Criminal Procedure 3.410 were inapplicable.

SUMMARY OF ARGUMENT

No basis for this court's exercise of discretionary jurisdiction exists in this case because the district court's decision does not expressly and directly conflict with the holding in Curtis v. State, 487 So.2d 1277 (Fla. 1985), which is distinguishable both factually and legally as specifically noted by the district court majority. The jury question at issue did not involve a communication within the express notice requirements of Florida Rule of Criminal Procedure 3.410 and this court as it did in Villavicencio v. State, 449 So.2d 966 (Fla. 5th DCA), rev. denied, 456 So.2d 1182 (Fla. 1984), should decline to exercise its discretionary jurisdiction.

ARGUMENT

PETITIONER DEMONSTRATES NO EXPRESS AND DIRECT CONFLICT BETWEEN THE HOLDINGS IN CURTIS V. STATE, 487 SO.2D 1277 (FLA. 1985) AND BRADLEY V. STATE, 11 F.L.W. 2141 (FLA. 5TH DCA OCT. 9, 1986) AND THE DISTRICT COURT'S SPECIFIC DETERMINATION THAT THE TWO CASES ARE FACTUALLY AND LEGALLY DISTINGUISHABLE SHOULD PRECLUDE THE EXERCISE OF THIS COURT'S DISCRETIONARY JURISDICTION.

In Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court noted that the constitutional provision¹ authorizing supreme court review of a district court decision that expressly and directly conflicts with the opinion of another district court or the supreme court on the same question of law was intended to make more stringent the standard for "conflict" review so as to properly implement and assure the district court's role as the final appellate court in most instances. Petitioner now seeks to expand the limited jurisdictional prerequisite for "conflict" review by asking this Court to exercise its jurisdiction despite the fact that the Curtis decision relied upon does not "expressly and directly" conflict with the district court's holding below; indeed, the district court properly distinguished the Curtis decision both factually and in legal import from the question presented by the instant case necessarily precluding any possibility of express and direct conflict between the two decisions.

¹Article V, Section 3(b) (3), Florida Constitution.

The district court's opinion correctly noted that while this court has strictly enforced the notice requirements of Florida Rule of Criminal Procedure 3.410 when the jury communication at issue is covered by the specific language of that rule (i.e., when the jurors "request additional instructions or to have any testimony read to them" the per se reversible error rule has not been applied in distinguishable factual situations which do not specifically come under the express notice requirements of Rule 3.410. Williams v. State, 488 So.2d 62 (Fla. 1986); Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Here, the juror's request was not for additional instructions or to have testimony read to them; rather, they sought to have read to them extraneous material (a police report) not admitted into evidence or in any way considered and the trial court simply properly rejected their request as a matter of judicial administration under Florida Rule of Criminal Procedure 3.400 which restricts jury consideration to those items introduced into evidence, a section which does not encompass the same strict procedural notice requirements of Rule 3.410. Indeed, despite the fact that the genesis of Curtis was the decision in Ivory v. State, 351 So.2d 26 (Fla. 1977) the respondent notes that this court rejected a similar claim of "express and direct conflict" in a case with virtually identical operative facts argued by the same counsel before the same district court because the jury's request did not involve testimony or additional instructions regarding the law of the case and was therefore not within the strict purview of Rule

3.410. Villavicencio v State, 449 So.2d 966 (Fla. 5th DCA), rev. denied, 456 So.2d 1182 (Fla. 1984).

In Curtis this Court rejected the argument that a harmless error standard should be applied for violations of Rule 3.410 and reaffirmed Ivory and its per se reversal rule. However, the jury questions at issue in Ivory clearly involved requests within the parameters of Rule 3.410 since they did in fact involve previous testimony and a specific request for legal instruction. The jury request at issue in this case, however, did not involve previous testimony and did not encompass any request for legal instruction. Given the district court's proper determination that the request and communication at issue was outside the express notice requirements of Rule 3.410 the strictures of that rule are inapplicable and this court, as it did in Villavicencio, should reject the appellant's express and direct conflict claim and refuse to exercise its discretionary jurisdiction especially given the obvious factual distinctions between the instant case and Curtis and the lack of any new rule of law announcement which conflicts in anyway, let alone expressly and directly, with that of Curtis. Mancini v. State, 312 So.2d 732 (Fla. 1975); Neilson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). See, also, Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983) - distinguishable factual circumstances undermine allegation of express and direct conflict.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

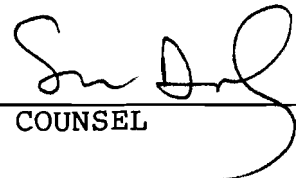
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished, by delivery, to Larry B. Henderson, Assistant Public Defender for Petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014 this 11th day of December, 1986.


OF COUNSEL