

IN THE SUPREME COURT OF FLORIDA

70,779

CASE NO.

K. C., a juvenile,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED

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Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

This is a petition for discretionary review of a decision of the District Court of Appeal, Third District, on the grounds that the decision expressly and directly conflicts with decisions from other district courts of appeal. In this brief, all references are to the petitioner's appendix, paginated separately and identified as "A", followed by the page number.

STATEMENT OF THE CASE AND FACTS

The juvenile petitioner, K.C., was charged by petition for delinquency with one count of petit theft for taking merchandise from a grocery store, and two counts of resisting the efforts of two store employees to recover the merchandise (A. 1-2). Following an adjudicatory hearing, the juvenile was adjudicated delinquent on all counts (A. 2).

On appeal to the District Court of Appeal, Third District, the adjudication of delinquency for the two counts of resisting a merchant was affirmed based on the following holding:

The trial court's finding that the juvenile had committed the charged act of petit theft satisfied the requirement of section 812.051(6) that in order to be convicted for resisting a merchant, one must be found guilty of the underlying theft.

(A. 2). In reaching this holding, the district court expressly noted that two other district courts of appeal had taken a contrary position:

We are not persuaded by appellant's argument on appeal that the motion for judgment of acquittal as to these counts should have been granted because the statute precludes the bringing of such charge until after a conviction for petit theft has been obtained.³ We recognize that two other district courts have taken this position. In the Interest of J.L.P., 490 So.2d 85 (Fla. 1st DCA 1986) (affirming delinquency adjudication based on theft of bicycle pump, but remanding

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In moving the trial court for a judgment of acquittal as to the charges of resisting a merchant, the juvenile's appointed counsel argued only that the state had failed to prove the petit theft charge, and thus, the motion should be granted.

for dismissal of charge of resisting a merchant holding that the statute required a finding of guilt on the theft charge before a defendant could be charged with resisting arrest); K.M.S. v. State, 402 So.2d 593 (Fla. 5th DCA 1981) (failure of court charging juvenile with resisting a merchant to include element that juvenile was subsequently found to be guilty of theft of the subject merchandise entitled juvenile to granting of motion to dismiss).

(A. 2-3) (emphasis in original).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed June 22, 1987.

SUMMARY OF ARGUMENT

In the only district court of appeal decisions to consider the issue prior to the decision of the Third District Court of Appeal in the present case, the First and Fifth District Courts of Appeal have held that Section 812.015(6), Florida Statutes (1983) precludes the bringing of a charge of resisting a merchant's efforts to recover merchandise until after a conviction has been obtained for the theft of that merchandise. In its decision in the instant case, the Third District Court of Appeal expressly rejects the position taken on this issue by the First and Fifth District Courts of Appeal. In doing so, the district court has created an express and direct conflict of decisions which warrants this Court's exercise of its discretionary jurisdiction.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL IN IN THE INTEREST OF W.L.B., 502 So.2d 50 (Fla. 1st DCA 1987) AND IN THE INTEREST OF J.L.P., 490 So.2d 85 (Fla. 1st DCA 1986), AND THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN K.M.S. v. STATE, 402 So.2d 593 (Fla. 5th DCA 1981).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In the present case, the Third District Court of Appeal announced a rule of law which conflicts with a rule previously announced by the First District of Appeal in In the Interest of W.L.B., 502 So.2d 50 (Fla. 1st DCA 1987) and In the Interest of J.L.P., 490 So.2d 85 (Fla. 1st DCA 1986), and by the Fifth District Court of Appeal in K.M.S. v. State, 402 So.2d 593 (Fla. 5th DCA 1981). Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

Section 812.015(6), Florida Statutes (1983) provides as follows:

An individual who resists the reasonable effort of a law enforcement officer, merchant, merchant's employee ... to recover the merchandise ... which the law enforcement

officer, merchant, merchant's employee ... had probable cause to believe the individual had concealed or removed from its place of display or elsewhere and who is subsequently found to be guilty of theft of the subject merchandise ... is guilty of a misdemeanor of the first degree, ... unless the individual did not know, or did not have reason to know, that the person seeking to recover the merchandise ... was a law enforcement officer, merchant, merchant's employee ...

Every district court of appeal decision prior to the issuance of the decision in the present case has held that the foregoing statute precludes the bringing of a charge of resisting a merchant until after a conviction for theft has been obtained. In the Interest of W.L.B., supra; In the Interest of J.L.P., supra; K.M.S. v. State, supra.

Notwithstanding these decisions, in the present case the Third District Court of Appeal rejected the juvenile's contention that he could not be simultaneously charged with theft of merchandise and resisting a merchant's efforts to recover that merchandise, and held the following:

The trial court's finding that the juvenile had committed the charged act of petit theft satisfied the requirement of section 812.051(6) that in order to be convicted for resisting a merchant, one must be found guilty of the underlying theft.

(A. 2).¹ In so holding, the district court recognized that the

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In a footnote, the district court, alluded to the fact that the juvenile's trial counsel had only argued for a judgment of acquittal as to the charges of resisting a merchant on the ground that the state had failed to prove the petit theft charge (A. 2). However, the district court did not hold that this fact precluded the argument on appeal that the motion for judgment of acquittal as to the counts charging resisting a merchant should have been granted because section 812.015(6) precludes the (Cont'd)

First and Fifth District Courts of Appeal had taken the position which was being rejected in this case:

We recognize that two other district courts have taken this position. In the Interest of J.L.P., 490 So.2d 85 (Fla. 1st DCA 1986) (affirming delinquency adjudication based on theft of bicycle pump, but remanding for dismissal of charge of resisting a merchant, holding that the statute required a finding of guilt on the theft charge before a defendant could be charged with resisting arrest); K.M.S. v. State, 402 So.2d 593 (Fla. 5th DCA 1981) (failure of count charging juvenile with resisting a merchant to include element that juvenile was subsequently found to be guilty of theft of the subject merchandise entitled juvenile to granting of motion to dismiss).

(A. 2-3).²

This Court's exercise of its discretionary jurisdiction is necessary to remedy the conflict of decisions created by the decision of the Third District Court of Appeal in the present case.

bringing of such charge until after a conviction for petit theft had been obtained. Rather, the district court expressly rejected this argument on its merits, and expressly held that a trial court's finding of guilt as to the petit theft charge was all that was needed to support a conviction for resisting a merchant. It is this express holding which directly conflicts with the previously cited cases from the First and Fifth District Courts of Appeal.

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The district court neglected to mention the decision of the First District Court of Appeal in In the Interest of W.L.B., supra (finding that offense of resisting a merchant was incomplete at the time of the alleged petit theft, as the juvenile could not be charged with that offense until he was convicted of the petit theft).

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 30th day of June, 1987.


HOWARD K. BLUMBERG
Assistant Public Defender