IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 72,402
DCA CASE NO. 87-926

CITY OF ORLANDO,

Petitioner,

vs.

ALAN L. BIRMINGHAM,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

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DESIGNATION OF PARTIES AND OF THE SUBJECT MATTER

In this Jurisdictional Brief the City of Orlando will be variously referred to as "City" or "Petitioner". Alan L. Birmingham, will be variously referred to as "Birmingham" or "Respondent".

SUMMARY OF ARGUMENT

This court has jurisdiction to hear appeals from decisions of District Courts of Appeal, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv) and the Florida Constitution, which expressly and directly conflict with decisions of other District Courts of Appeal or of the Supreme Court on the same issue of law. The instant decision expressly and directly conflicts with prior decisions of both the Supreme Court and other District Courts of Appeal. The instant opinion erroneously applies the Doctrine of Fundamental Error and extends the reach of that doctrine far beyond its intended and very limited scope.

The Fifth District Court of Appeal failed to consider the impact of several other instructions regarding probable cause and considered the instruction quoted on page 2 in isolation. Respondent Birmingham did not object to this instruction which actually imposes upon the Petitioner a standard much higher than the law requires. Timely objection would have prevented or obviated any error in this instruction. In fact no reversible fundamental error occurred. Furthermore, the opinion of the District Court expressly and directly conflicts with other decisions applying the two issue rule. The instant opinion could be interpreted as a finding of no legal cause and therefore no liability. This court has jurisdiction and should accept jurisdiction in order to correct a very serious deviation from the limited scope of the fundamental error rule.

ISSUE I

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL REVERSING THE JURY VERDICT IN FAVOR OF PETITIONER, CITY OF ORLANDO, EXPRESSLY AND DIRECTLY CONFLICTS WITH A PRIOR DECISION OF THE SUPREME COURT AND THE THIRD DISTRICT COURT OF APPEAL IN APPLYING THE FUNDAMENTAL ERROR RULE TO THE INSTANT CASE.

Florida Rule of Civil Procedure 1.470(b) requires parties to file written jury instructions and further requires parties to object to jury instructions proposed by the opposing party. Cases interpreting this rule and its predecessor have consistently held that Appellate Courts will not consider objections to instructions not raised at the time of the charge conference. In general, objections to jury instructions are waived by failure to raise such objections at the charge conference. Eli Witt Cigar and Tobacco Co. v. Matatics, 55 So.2d 549 (Fla. 1951); Lollie v. General Motors Corporation, 407 So.2d 613 (Fla. 1st DCA 1981) pet. for rev. den. 413 So.2d 876; Indian River Construction Company, Inc. v. City of Jacksonville, 350 So.2d 1139 (1st DCA 1977); High, Clarke and Feneis, Inc. v. Public Service Mutual Insurance Company, 238 So.2d 169 (Fla. 3d DCA 1970); Sharpsteen v. Keesler, 178 So.2d 623 (Fla. 3d DCA 1965) and Smith v. Tantlinger, 102 So.2d 840 (Fla. 2d DCA 1958).

Fundamental error is an exception to this general rule. However, the fundamental error rule is much narrower in scope than the rule applied by the Fifth District Court of Appeal in the instant case. In Smith v. State, 13 FLW 42 (Fla.

1/21/88), this court refused to apply the Doctine of Fundamental Error in considering the admitted inadequacy of an old standard jury instruction on insanity. Instead this court limited the Doctrine of Fundamental Error to those rare cases where a jurisdictional error appears where the interests of justice present a compelling demand for its application. Because the insanity instruction in Smith was not objected to, and because the insanity instruction in Smith was not so flawed as to deprive the Defendant of a fair trial, this court held that giving the outmoded insanity instruction did not constitute fundamental error. Smith v. State, 13 FLW 42, 43 (Fla. 1/22/88). Likewise, in the present case the civil disobedience instruction did not merit application of the fundamental error rule.

Similarly, in Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985), it was held that the Doctrine of Fundamental Error could not be raised on appeal to cure defects resulting from erroneous jury instructions where a contemporaneous objection was not made to the jury instruction at trial. Wagner v. Nottingham Associates, supra, at 169, 170. Instead, the court noted that the Doctrine of Fundamental Error could only be applied where it affirmatively appeared that the error could not have been cured if met with a timely objection. Because a timely objection clearly would have cured the defect resulting from erroneous jury instructions, the judgment below was affirmed.

Likewise, in the instant case, the timely objection clearly would have obviated any error resulting from the giving of an erroneous jury instruction. Nonetheless, the Fifth District Court of Appeal erroneously relied upon the Doctrine of Fundamental Error to reverse the judgment in favor of the Defendant. Therefore, not only does the decision of the Fifth District Court of Appeal expressly and directly conflict with the decision of this court in Smith v. State and the decision of the Third District Court of Appeal in Wagner v. Nottingham Associates, it also expressly and directly conflicts with the decision of the Third District Court of Appeal in Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981). In Pinder, the court held that fundamental error exists only when it clearly and affirmatively appears that the result would not have been affected by the failure to object. In the instant case, the probable cause instruction was not fundamentally erroneous because the record does not affirmatively show that the alleged error could not have been cured if met with a timely objection. In fact, it goes without saying that a timely objection to the probable cause instruction would have immediately brought any questions regarding the instruction to the attention of the court and could have easily resulted in the elimination of any defects in that instruction. Because a timely objection could well have changed the format of this instruction, fundamental error simply did not occur. This exception should not be applied where the error could have been cured by

objection below. In Wagner the court refused to apply the fundamental error rule when proper objections were not made to certain jury instructions at the charge conference. Wagner involved a malicious prosecution claim which also involves the issue of probable cause.

Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981) stated in footnote 3 that fundmental error exists only when it clearly and affirmatively appears that the result could not have been affected by the failure to object. In the instant case the probable cause instruction was not fundamentally erroneous because the record does not affirmatively show that the alleged error could not have been cured below if met with a timely objection. The underlined language in the instruction quoted in footnote 1 of the instant opinion could certainly have been eliminated by the court if timely objection was made. Since a proper objection could well have changed the format of this instruction, fundamental error simply did not occur.

The language underlined in the probable cause instruction set forth on page 2 of the opinion of the Fifth District Court of Appeal actually favors the Respondent Birmingham because it imposes a standard much higher than the law requires. Certainly error which benefits the opposing party cannot be fundamental reversible error. The instant opinion clearly conflicts with Wagner. The opinion under review also expressly and directly conflicts with Smith which held that an inadequate defensive instruction did not present fundamental error. Accordingly, this court has jurisdiction.

It is important for this court to accept jurisdiction in order to define the appropriate limits of the fundamental error rule. If allowed to stand, the instant opinion will set an inappropriate precedent which expands the fundamental error rule far beyond its intended and very limited scope. Although the Fifth District said that the probable cause instruction most likely caused confusion on the part of the jury, no facts in the record are cited for this assumption.[1]

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[1] If jurisdiction is accepted the record will show that the only question submitted by the jury referred to the definition of legal cause (R. 553-554). In its question the jury did not request additional instructions on the issue of probable cause (R. 553-554) and was obviously not confused on this issue.

ISSUE II

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL REVERSING THE JURY VERDICT IN FAVOR OF PETITIONER, CITY OF ORLANDO, EXPRESSLY AND DIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL IN FAILING TO CONSIDER ALL OF THE JURY INSTRUCTIONS AS A WHOLE AND IN FAILING TO APPLY THE TWO ISSUE RULE TO THE INSTANT CASE.

The present District Court opinion also conflicts with other cases from the Supreme Court of Florida and other District Courts of Appeal. In determining the propriety of a challenged instruction the charges must be considered in their entirety and not in isolated portions. Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3d DCA 1957). The Florida Supreme Court has mandated that all instructions must be examined. Dowling v. Loftin, 72 So.2d 283 (Fla. 1954). The evidence must also be considered to determine if prejudicial error existed. Crosby v. Stubblebine, 142 So.2d 358 (Fla. 2d DCA 1962). Even though part of an instruction may appear erroneous, reversal is not justified where the law is fairly stated by considering the complete charges. Florida Eastcoast Railway Company v. Lawler, 151 So.2d 852 (Fla. 3d DCA 1963). If, as a whole, the law is fairly stated, portions singled out for attack will avail Appellant nothing. Grimm v. Prudence Mutual Casualty Company, 243 So.2d 140 (Fla. 1971).

In Grimm the court held that the District Court should have applied the rule requiring examination of the complete charge to the jury. The text of the present decision does not discuss examination of the charges as a whole or even

all of the charges pertaining to probable cause. Page 2 of the opinion singles out only one of several probable cause instructions.[2] In order to properly apply this rule as required by Grimm the court should have discussed how this particular charge affected all other charges on the same issue and whether, on the whole, the law was fairly stated. In failing to discuss this aspect of the charges the instant opinion conflicts with Grimm. The instant opinion also conflicts with Florida Eastcoast Railway Company and Chambers, supra.

The present decision also fails to discuss the applicability of the two issue rule set forth in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978). In Gonzalez v. Leon, 511 So.2d 606 (Fla. 3d DCA 1987) the court applied the two issue rule to a jury's verdict which could be interpreted as either a finding of no negligence or as a finding of no legal cause. Where an alleged erroneous instruction related only to the issue of causation, the verdict could be supported by a finding of no negligence and therefore affirmance was required in Gonzalez. Likewise, in the instant case, the verdict of the jury could be sustained on the basis that the jury found no legal cause.

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[2]Several instructions regarding probable cause were given (R. 543-544). If the court accepts jurisdiction it will find at page R. 543 "probable cause means a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to justify a cautious man in believing another person to be guilty of a crime. Probable cause is not equivalent to absolute certainty. It does not require proof beyond a reasonable doubt."

Furthermore, the opinion under review also conflicts with Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982). There the Fifth District Court of Appeal itself held that failure to properly object did not preserve issues regarding jury instructions for appeal. Middelveen also applied the two issue rule and affirmed the verdict.

Read literally, it would appear that the instant opinion finds fundamental error because of what the court perceived as inadequacies or incompetency of Respondent's trial counsel in a civil case. Such matters are more properly addressed in an action by Respondent Birmingham against his trial counsel. It is manifestly unjust to impose the costs and expenses of a new trial on Petitioner, City of Orlando, when the Respondent, Birmingham, has other full and complete remedies.

CONCLUSION

Under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), this court has the jurisdiction to hear appeals from decisions of District Court of Appeal which expressly and directly conflict with decisions of other District Courts of Appeal or of the Supreme Court on the same question of law. In the instant case, it is abundantly clear that the opinion of the Fifth District Court of Appeal expressly and directly conflicts with the prior decision of this court in Smith v. State, 13 FLW 42 (Fla. 1/22/88), as well as the decisions of the Third District Court of Appeal in Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985) and Pinder v. State, 396 So.2d 272 (Fla. 3d DCA 1981).

Likewise, the decision of the Fifth District Court of Appeal expressly and directly conflicts with the decisions of this court in Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3d DCA 1957) and Dowling v. Loftin, 72 So.2d 283 (Fla. 1954). The decision of the Fifth District Court of Appeal expressly and directly conflicts with numerous decisions of other District Courts of Appeal. Accordingly, this court has jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 16th day of May, 1988 to James Freeland, Esq., 126 E. Jefferson Street, Orlando, Fl 32801 and to Deborah Edens, Esq., 230 East Monument Avenue, Kissimmee, Fl 32741.

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