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.

RESPONDENT'S JURISDICTIONAL BRIEF

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SUMMARY OF ARGUMENT

There is no decision of this Court or other Florida state appellate courts which expressly and directly conflicts with the decision of the Fifth District Court of Appeal in this case. The jury verdict in favor of petitioner was reversed by the Fifth District because not to do so would result in manifest injustice. Fundamental error existed in instructing the jury as to probable cause, "civil disobedience," and other matters.

The cases cited by petitioner are all distinguishable and not revealing in any way to this cause. Furthermore, petitioner argues the "two-issue" rule which was not an issue on appeal.

Petitioner attempts to re-argue the merits of his case. The Fifth District Court of Appeal did not abuse its discretion; nor, is the ruling in conflict with this Court or other Florida law.

Respondent requests jurisdiction be denied and this cause proceed to a new trial on its merits.

ARGUMENT

ISSUE I

JURISDICTION SHOULD BE DENIED IN THAT NO EXPRESS AND DIRECT CONFLICT APPEARS IN THE DISTRICT COURT'S DECISION.

With the 1980 Amendment of Section 3, Article V of the Florida Constitution, conflict jurisdiction by the Supreme Court exists only where the alleged conflict is expressly and directly set forth in the district court's decision to be reviewed. This requirement has been adopted by this court under the March 27, 1980 revisions to Rule 9.030(2)(A), Florida Rules of Appellate Procedure, which now state:

> (2) Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:
>
> (A) decisions of district court of appeal that:
>
> * * *
>
> (iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law. (emphasis added)

Under the above constitutional requirement, this court has no jurisdiction to review alleged conflicts not expressly stated within the decision to be reviewed. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980) wherein this court defined "express" and "expressly" to mean respectively:

> "to represent in words" and "in an express manner."

The 1980 Amendment to Section 3, Article V of the Florida Constitution was to aid in reducing the number of cases on appeal to the Supreme Court based upon "alleged" conflicts between district court decisions. To grant the petitioner's request herein would circumvent the language, intent and purpose of the 1980 Amendment and would again subject this court to innumerable appeals based on "alleged" conflicts.

Petitioner argues conflict with Smith v. State, 521 So.2d 106 (Fla. 1988). In Smith, this court held there was no fundamental error in reading the standard jury instruction on insanity in consolidated cases involving charges of murder in the first degree and murder in the second degree. Even though this court in Yohn v. State, 476 So.2d 123 (Fla. 1985), reversed a conviction and held it was error for the trial court to refuse to read special instructions by the defense on insanity because they more accurately reflected the law of Florida; the fact remained, in Smith and its consolidated case, the standard instruction was read, without objection, and without the offer of special instructions by defense counsel. Smith, at page 107. The Smith court noted that there was nothing unconstitutional about the standard instruction.

The Smith court reiterated that "the doctrine of fundamental error should be applied only in rare cases where a jurisdiction error appears or where the interests of justice present a compelling demand for its application." citing Ray v. State, 403 So.2d 956 (Fla. 1981)

The petitioner further relies upon the lower court opinions of Wagner v. Nottingham Assoc., 464 So.2d 166 (3rd D.C.A., Fla. 1985) and Pinder v. State, 396 So.2d 272 (3rd D.C.A., Fla. 1981). The Wagner decision is distinguishable in that at oral argument the question was raised whether the correct theory of liability went to the jury. Id. at p. 167. The Third District Court of Appeal dismissed the query as not before the court because no fundamental error existed and no preservation of error was made. The court further held that if the case had been tried on the wrong theory, the proper remedy was for a new trial, not reversal for judgment in favor of the party against whom the original judgment was entered. Id. (even though the case went to the jury on the wrong theory of liability, a prima facie case existed and went to the jury on the correct elements.)

The Third District Court of Appeal in Pinder held that the party convicted of a minimum-mandatory three year sentence for armed robbery could not at first instance on appeal raise the issue of failure of the witness to provide evidence the firearm was real and not a toy pistol. There existed no manifest injustice in the Pinder case. Contrarily, in this instant appeal, the jury had to weigh the evidence against completely erroneous law which did not involve the facts of the case.

The fact remains that the Fifth District Court of Appeal found more than one erroneous misstatement of the law. The three instructions read on probable cause, all, misstated the law as it relates to a misdemeanor, for which respondent was

arrested. (App. 1, 2) The jury was charged with the instructions for a felony arrest.

The jury was instructed that if respondent participated in civil disobedience, the verdict should be in favor of the petitioner. (App. 3) Civil disobedience was defined as refusal to obey a government demand or command. (App. 4)

The unanimous decision by the Fifth District Court of Appeal was based upon the manifest injustice that would befall the respondent if the verdict were to stand, in that, the instructions, more than one, were plainly wrong and misleading. Petitioner does not attempt to find conflict by showing that the instructions were correct or harmless. The decision by the Fifth District Court of Appeal in no way conflicts with the law of the state of Florida.

Respondent requests that this court find no jurisdiction in this cause.

ISSUE II

THE CASES CITED BY THE PETITIONER ARE NOT IN CONFLICT WITH THE DECISION HEREIN.

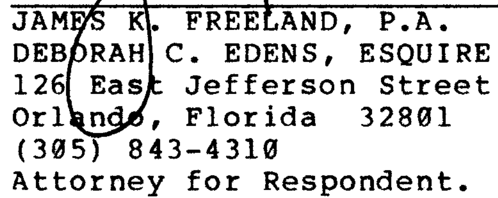
The petitioner argues the jury instructions must be taken in their totality. The opinion of the Fifth District Court of Appeal clearly refers to the numerous instructions which were plainly wrong and misleading. The instructions covered the issues of probable cause, civil disobedience, and other related matters. The Fifth District Court of Appeal emphatically felt that the combination of errors required that the verdict be reversed, else, manifest injustice would enure to the respondent who had certainly not received a fair trial.

Petitioner also attempts to argue the "two-issue" rule. This was not raised on appeal, at oral argument, or on motion for rehearing en banc. Furthermore, the subject is not relevant to the facts of this case where the jury was improperly instructed on the law of probable cause, civil disobedience, resisting arrest and other matters; all of which law is directly related to each of the separate theories of liability presented by respondent. (false imprisonment; assault; and unlawful arrest) (App. 1) Fundamental error clearly existed in this case, requiring reversal of the jury verdict and remanding for a new trial.

CONCLUSION

Based on the authority and argument herein, the respondent requests that this honorable court deny that jurisdiction exists in this cause.

Respectfully submitted,



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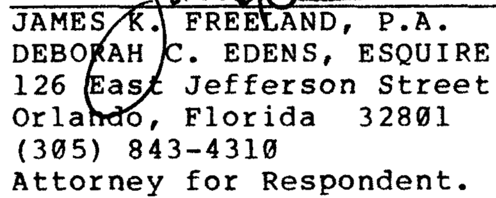
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail this 10th day of June, 1988 to STEVEN F. LENGAUER, ESQUIRE, P.O. Box 20154, Orlando, Florida 32814.



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